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IN THE

**United States**

**Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

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FIREMAN'S FUND INSURANCE  
COMPANY, a corporation,

*Appellant,*

vs.

THE GLOBE NAVIGATION COM-  
PANY, a corporation, and S. P.  
WESTON, as trustee in bankruptcy  
of the Globe Navigation Company,  
a corporation, bankrupt,

*Appellees.*

No. 2631.

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*Upon Appeal from the United States District Court  
for the Western District of Washing-  
ton, Northern Division.*

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**BRIEF FOR APPELLEES**

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H. R. CLISE,  
C. K. POE,  
W. H. BOGLE,  
C. B. GRAVES,  
F. T. MERRITT,  
LAWRENCE BOGLE,

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The appellant company, on April 17, 1911, issued two policies of marine insurance, insuring the Schooner "William Nottingham" in the total sum of \$30,000.00 for the period of one year from April 20, 1911. The vessel was valued in the policies at \$45,000.00. The vessel suffered a disaster in Octo-



ber, 1911, and this action was subsequently brought to recover the amount of the insurance as for total loss. The appellant company defended the action upon two grounds: First, that the vessel was unseaworthy at the commencement of the voyage in question, and therefore the policies were void; and, Second, that the loss was not total under the terms of the policies.

In this brief we treat the policy as governed by the *Civil Code of California*, because that Code is specifically referred to in clause 3 of the policy as furnishing the measure of liability under the policy, and also because the attestation clause recites that the policy is issued at San Francisco. The policy was actually delivered in Seattle, and the premium was there paid. If the Washington statute governs, the contentions we make are equally applicable, as the Washington statute defining abandonment and constructive total loss are substantially the same as the California statute.

*Session Laws of Wash.* 1911, p. 25.

**UNSEAWORTHINESS.**

The policies were issued on April 17, 1911, for the period of one year from April 20, 1911. The vessel was engaged in the lumber trade and had been so employed by the Globe Navigation Company since her purchase by it in 1908. She returned from a voyage to Australia in September, 1911, and proceeded to Westport, Oregon, on the Columbia River above Astoria, where she loaded a full deck and under-deck cargo of lumber for Callao, Peru. Before proceeding to Westport for loading, however, the vessel was surveyed at Astoria, Oregon, by Captain Crowe, who is admitted to have been a surveyor for the appellant company at that time. (His survey report is Plaintiff's Exhibit "M" in the record.)

After the vessel was fully loaded at Westport, she started on her voyage and grounded at the entrance of the slough to Westport. She went aground at high tide and remained aground until high tide of the next day, when she was pulled off by the assistance of two tugs. She then proceeded on her voyage down the river to Astoria, where another survey was had; and this survey was made by one Mr. Cherry, at the request of Captain Crowe, who,

for some reason, was unable to attend in person. (The survey report was signed by Cherry in the name of Captain Crowe, and is marked Plaintiff's Exhibit "N" in the record.) After this survey the vessel proceeded to sea on October 2nd, and crossed the Columbia River bar without any unusual incident. After crossing the bar and getting on his course, the master caused the mate to sound the pumps, and he found about fifteen inches of water in the hold of the ship, which was pumped out by the hand pump of the vessel. After two days at sea, on or about October 4th, when the wind had freshened to about thirty-five miles an hour, the wind shifted to the southwest and increased in velocity, and the master thereupon placed the vessel on the starboard tack. In doing so, the sea being rough and the vessel having a very heavy deck cargo, she took a heavy lurch to port, and the deck load shifted several inches. Immediately the vessel began to take water through the break of the poop and in the storeroom under the break of the poop (Apostles, p. 262). The master found immediately afterward that the galley was flooded with water as the result of the shifting of the deck load, and it filled to such an extent that the cook was driven out. This water came through the quick-work of the vessel. The master, finding that the hand pumps



were not able to keep down the water which the vessel was taking at the points above mentioned, as a result of damage from the shifting of its deck cargo, ordered the mate to start the steam pump (Apostles, pp. 263-4-5). This steam pump had been inspected by the surveyors on both of the surveys above referred to, and had been worked by them and found to be in perfect condition. At the time of the surveys, however, there was no water in the bilges of the vessel and consequently the steam pump was not attached to the hose extending to the vessel's bilges, but was attached to a hose running over the side of the deck and used in pumping water and washing the decks (Apostles, p. 312). When the mate started the steam pump it was found that something happened to be wrong and it would not work. The master states that there was some delay in getting the pump started, but he did not know just what the trouble really was. He states that there was no mechanical defect or broken part of the pump, and that its failure to work immediately was probably caused by a piece of wood or bark or something similar getting into the valves or clappers and stopping it up (Apostles, pp. 265-6).

At the time this testimony was taken, on August 30, 1913, the defense of unseaworthiness had not

been made in the pleadings, but on the contrary, the issues, as they then stood under the pleadings, admitted the liability of the appellant on the policies, but denied that there was a total loss. For this reason the facts with respect to the temporary obstruction of the steam pump were not developed in detail. It was mentioned merely as an incident. The steam pump, however, was gotten into good working condition by the crew and put to work in a very short time. The master (Apostles, p. 269) states that his recollection was that this was on the 6th, although he is not quite clear as to the exact date.

On October 8th a very heavy gale suddenly came up from the northwest, the wind blowing at the rate of about 100 miles an hour, which did considerable additional damage to the vessel, causing another shifting of the deck load and tearing loose some of her boats, hanging in the davits (Apostles, p. 270). The shifting of the deck load also carried away three masts and a large part of the deck load went over the side, threatening to swamp the ship. After considerable difficulty, the crew succeeded in cutting loose this wreckage and the pumps were again started. They had succeeded in almost freeing the vessel of water by the use of

the pumps when she was struck by another heavy gale from the southeast, and the vessel filled in a very short time. This was on October 11th. The vessel was in immediate danger of sinking and was abandoned by the master and crew, who were taken off by the Schooner "David Evans." It was admitted by proctors for the appellant that the crew was justified in abandoning the vessel at that time (Apostles, p. 283). The crew was landed at Astoria on Saturday, October 14th, and the master immediately caused notice to be given to its owners, by long-distance telephone, of the loss of the vessel.

The tug "Wallula" subsequently found and picked up the wreck and brought her into Astoria, reaching there about noon, October 15th. The owner, master and crew of the salving vessel "Wallula" retained possession of the vessel, making a claim for some \$34,000.00 against the vessel and cargo for salvage. The vessel was abandoned by the owner to the underwriter either on October 14th or October 16th. The appellee claims that a verbal abandonment was made on October 14th, but this is disputed by the appellant. A written abandonment was made on October 16th. There were no facilities at Astoria for repairing the vessel, nor could she be discharged, surveyed or examined at that place. After abandonment by the owner it was agreed by



the underwriter and owner that the owner should arrange to have the vessel taken up the Columbia River to St. Johns, near Portland, where she could be discharged and surveyed. The salvors would not surrender possession nor take the boat to St. Johns nor assume the expense nor the risk of the towage from Astoria to St. Johns. The owner, therefore, at the instance of the underwriter, applied to the United States Circuit Court at Portland, and obtained an order from that court in salvage proceedings permitting the towing of the vessel from Astoria to St. Johns, and the discharge of the cargo, upon condition that the expense thereof be paid by the owner as against the salvors, and that the owner would execute an indemnity bond to protect the salvors against the risks of the voyage. The bond was given by the appellee, and the vessel was thereupon towed to St. Johns, the cargo discharged, the vessel put in drydock and surveyed. Subsequently, representatives of the owner arranged a settlement with the salvors for a consideration of \$3,000.00. Thereupon, Johnson & Higgins, insurance adjusters, made a statement of the expenses incurred subsequent to the written abandonment of October 16th, by the owner, apportioning the expenses that were for the joint benefit of vessel and cargo between those interests, and charging to the

owner the expenses that were for the benefit of the vessel alone. The joint expenses of vessel and cargo, including the \$3,000.00 salvage award, amounted to \$8,780.00. The additional expenses charged to the owner alone, as found by the adjusters, amounted to \$3,244.58. The underwriter subsequently paid the owner, through the adjusters, two-thirds of the vessel's proportion of the joint expenses of vessel and cargo, as found by the adjusters.

Suit was brought on the policies on May 13, 1912, at Seattle, claiming a total loss. Appellant answered June 13, 1912, denying that the damages to the vessel amounted to total loss either actual or constructive, under the policies, but admitting its liability under the policies for its proportion of general average and salvage charges accruing from the preservation of the vessel and cargo. The average adjustment had not been completed at that time, so that the appellant was not able to and did not tender the amount for which it admitted liability under the policies. Subsequently, upon the completion of the average adjustment, as stated above, it did pay this proportion as a liability under the policies. On March 31, 1914, appellant filed an amended answer, setting up, for the first time, unseaworthiness as a defense to this action (Apostles,

p. 143). The unseaworthiness alleged in the answer consisted

“in that she was leaky and her pumps were not in working order so that the same could be used to keep said vessel free from water which entered her hull through said leaky condition, and that by reason thereof said vessel commenced to leak and became water-logged in fair weather immediately after starting upon said voyage. That all losses and damages suffered by said vessel upon said voyage were caused and occasioned by the aforesaid unseaworthiness of said vessel.”

No offer to rescind nor to return the unearned portion of the premium has ever been made nor pleaded by the insurer.

### **(1) Defense of Unseaworthiness Waived.**

The defense of unseaworthiness, put forth in the amended answer, had been waived. The vessel was brought into Astoria by the salvors on October 15, 1911, and was abandoned to the underwriter, verbally, on October 14th, and in writing on October 16th. The underwriter declined to accept abandonment, but admitted liability in the event a total loss within the terms of the policy was shown, and, in any event, admitted liability under the policy for any salvage or general average expenses that had been or might be incurred.

Negotiations between the owner and under-



writer began immediately after abandonment and continued until suit was brought in May, 1912. The underwriter, admitting its liability under the policy for some amount, and admitting its liability for the full amount in the event a total loss was shown, agreed with and induced the owner to incur the expenses shown in the average adjustment of Johnson & Higgins, by securing a transfer of the vessel from Astoria to St. Johns, and a discharge of the cargo and drydocking and survey of the vessel, and also the expenses of securing a restoration of possession of the vessel by the salvors to the owner and of disentangling her from the liens asserted by the salvors. In these operations, approved and instigated by the underwriter, the owner expended \$8,780.00 for the joint benefit of the vessel and cargo, and \$3,244.00 additional for the benefit of the vessel alone, as shown by the Johnson & Higgins adjustment. The underwriter not only had knowledge of and approved in advance these expenditures on the part of the owner, but in its pleadings when the action was brought, specifically admitted its liability on the policy and thereafter paid, through the adjusters, a portion of these expenses under its policy liability.

It is a settled principle of law that

“Any forfeiture of a policy caused by a violation of its terms will be deemed waived by the insurer if, after knowledge of the facts constituting such forfeiture, he treats the policy as obligatory.”

*Barber, Principles of Insurance*, p. 96.

“When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. It may, consulting its own interests, choose to waive the forfeiture, and this it may do by express language to that effect or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be inferred from its mere silence. It is not obliged to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture; but it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy or does acts based thereon, or requires the insured, by virtue thereof, to do some act or incur some trouble or expense, the forfeiture is as a matter of law waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel.”

*Titus vs. Glen Falls Ins. Co.*, 81 N. Y. 419.

When the insurer, conceding its liability under the policy for some amount, induced the owner to

incur the expenses which are shown to have been incurred subsequent to October 16, 1911, it thereby waived any right to claim that the policy had been forfeited by starting on a voyage in an unseaworthy condition unless it is shown that the insurer did not have knowledge of the facts which it now claims constituted unseaworthiness.

The appellant, in its brief, contends that the vessel must be presumed to have been unseaworthy at the commencement of the voyage, because, as it claims, the vessel sprang a leak within a few days after sailing, under weather conditions which would not ordinarily cause such a leak, the leak being so great that the hand pump could not handle the water and the steam pump being found unworkable when needed. We do not dispute the legal proposition laid down in cases cited on page 12 of appellant's brief.

It is manifest, however, that the appellant was substantially as well informed as to the conditions developed by the testimony at the time it induced appellee to incur these expenses and at the time it paid a proportion thereof to the appellee, as it was at the time it filed its amended answer herein. The report of protest made by the master in October, 1911 (contained in Res. Exhibit 4); and the



statement of the incidents of the voyage as contained in the average adjuster's report, and in the survey report of Walker and Crowe (Plaintiff's Exhibit "M"), are substantially the same as were set forth in the testimony in the case. The only testimony in the record tending to show unseaworthiness at the beginning of the voyage, aside from the argument based upon the alleged defect in the steam pump, was that of Captain S. B. Gibbs, who stated that there was an open seam on the port side of the vessel below the load line where the oakum was found to be missing in the seam and which opening was of such size at the time he examined it in May, 1912, as to have admitted a considerable quantity of water into the bilges of the ship. He does not, of course, testify that this defect existed at the time the vessel commenced her voyage at Westport, but does express a tentative or qualified opinion that it probably was or might have been caused by the failure to caulk this seam at the time the vessel was last recaulked in 1907 (Apostles, p. 428). He also found a small crack in the lead flange of the water closet which he thinks might have admitted some water, although it is apparent from his testimony that the amount would be very small. The appellant has introduced into the record a copy of a night letter which it claims was

received by it from Captain Crowe, its marine surveyor, under date of December 21, 1911, which specifically calls attention to this open seam referred to by Captain Gibbs (Apostles, pp. 440-1). If the contention of the appellant that the vessel was unseaworthy is based upon leaks from the existence of this open seam, then appellant had full notice thereof at least as early as December 21, 1911. If this is not the defect relied upon as creating the leaky condition, then the record is absolutely devoid of any evidence tending to show the cause of the leak except the damages occurring after the voyage commenced, to-wit: The stranding at the mouth of the slough near Westport, the heavy lurch of the ship and the shifting of the heavy deck cargo on October 4th and other sea damages thereafter, as testified to by the master. If the leaks were caused by these occurrences they do not tend to show unseaworthiness at the commencement of the voyage at Westport. At any rate, the appellant knew, at least as early as the latter part of October or early in November, 1911, that the vessel had suffered this disaster a few days after going to sea, and it knew the incidents of the voyage from the protest of the master and the statement to the average adjusters contained in their report, and if it intended to rely upon unseaworthiness as a defense, it should have

made its decision to that effect at that time, before inducing the appellees to incur the expenses we have referred to.

With respect to the failure of the steam pump to work immediately, that fact was known to appellant at least as early as December 21, 1911. In the report of the survey by Crowe and Walker, representing the underwriter and the owner (Plaintiff's Exhibit "M"), it is recited that on October 6th "an attempt was made to start the steam pump, which, however, failed to work." (See Apostles, p. 259.)

## (2) Vessel Was in Fact Seaworthy.

As stated above, the only defects claimed in the vessel, so far as shown by the evidence, consisted of this alleged open seam and the crack in the water closet flange. Captain Gibbs, the expert surveyor representing the respondent, stated that this seam at the time he examined the vessel, in May, 1912, was approximately six inches long and one-sixteenth of an inch in width. It will be noticed that he carefully avoided stating, or even expressing an opinion, that an amount of water could enter the vessel through this open seam in excess of the capacity of the ordinary ship's hand pumps to handle. The



most that can be gathered from his testimony is that, under sufficient pressure, it might be possible for the vessel to receive enough water through this open seam and through the crack in the toilet flange to keep the pumps fairly busy.

We have no disposition to criticize the testimony of any of the witnesses in this case, but we feel that it is only fair to say that Captain Gibbs' testimony, particularly on cross-examination, shows a partisanship and a reluctance to admit any fact favorable to the appellees, for which allowance must be made in considering the weight to be given to his opinions. He would not state that the oakum from this seam was missing prior to the commencement of this voyage, but did finally, when pressed, express the opinion that the seam was probably overlooked when the vessel was last caulked (Apostles, p. 428).

The testimony shows that the vessel was last caulked in 1907, in Boston (Apostles, p. 238). She had been engaged in the lumber trade continuously from 1908 down to the happening of this accident in October, 1911. Immediately before the loading for this voyage she had just returned from a voyage to Australia, carrying lumber. She had never, at any time during those three years, experienced any

trouble whatever from water in her hold. (See Swenson's testimony, pp. 285-6, p. 325.) It is obvious, therefore, either that this open seam did not exist prior to the end of her last voyage preceding this one, or that it was not such an opening as would admit sufficient water to endanger the ship. According to Captain Gibbs' testimony, this seam was located below the load line. Manifestly, during the three years preceding, on all of the voyages the vessel had made, this seam was under water and the vessel had at various times successfully encountered severe storms, and, according to the testimony of the master, had never taken in any quantity of water beyond the normal for such vessels.

Mr. Walker testified that when he examined the vessel, in the fall of 1911, after the accident, there was a small place in this seam where the oakum was missing, but it was not nearly so large as it was in May, 1912, when examined by Captain Gibbs, and that, in his opinion, the quantity of water which could enter the vessel through this open seam was not sufficient to cause any trouble whatever (Apostles, pp. 354-5).

Even if the existence of this open seam would have constituted unseaworthiness, there is no reason whatever to conclude that such was its condition

at the beginning of this voyage. As stated above, the vessel had just returned from a long voyage, on which she had carried a full-deck and under-deck lumber cargo and had not taken in any unusual amount of water.

The current voyage commenced at Westport, on the Columbia River, on September 26, 1911. The testimony shows that when the vessel was proceeding to Westport to receive her cargo, she was examined by Captain Crowe, on behalf of the underwriters, at Astoria, and received the usual certificate of seaworthiness from him (Plaintiff's Exhibit "M"). She then proceeded to Westport and loaded her cargo and started on her voyage from Westport. If she was seaworthy at the time she loaded cargo at Westport and started on her voyage, then the implied warranty is satisfied. After leaving Westport, the vessel stranded at the mouth of the slough on the Columbia River, at high tide, and remained aground until high tide of the next day, when she was pulled off by two tugs. She then proceeded down the river to Astoria, where she was again examined and surveyed by a representative of Captain Crowe's office, and the usual certificate of seaworthiness was issued by him in Captain Crowe's name. (This certificate is Plaintiff's Exhibit "N.")



It is claimed by appellant, in its brief, that this examination was not made by Captain Crowe, but by Mr. Cherry, who was in fact a Lloyd's surveyor. It is a fact, however, that Mr. Cherry acted ostensibly at the request of Captain Crowe and as his representative. However, whether the inspection was made by Captain Crowe or a Lloyds surveyor is immaterial. The vessel was found to be seaworthy. Of course, as the vessel was fully loaded, it was impracticable to examine her hull below the load line. After this inspection, the vessel proceeded on her voyage. The incidents thereafter are given by Captain Swenson.

The steam pump was used at Astoria in washing down the sides of the vessel, and worked perfectly. It was not used on the bilges for the reason that there was no water in the bilges. The pump, however, was examined and tested by Captain Crowe at the time he made the survey (Plaintiff's Exhibit "M"). (See Swenson's Testimony, Apostles pp. 325-6.)

The vessel left Astoria, outward bound, October 2nd. Two days later the master found she was taking slightly more water than normal. This was October 4th. It required the use of the hand pump about one hour in four to keep the water down. The

wind was then blowing about thirty-five miles an hour (Swenson's Test., Apostles, p. 262). The wind then shifted to the southwest and increased in velocity and the sea became fairly rough. The master put the vessel on the starboard tack, and, as he did so, owing to the condition of the sea, the vessel gave a lurch to port and shifted the deck cargo some three or four inches. Soon thereafter the master discovered that water was coming into the vessel in considerable quantities in the store-room under the break of the poop. He also found water coming in freely forward, flooding the galley. This increased flow of water is stated by the master to have been caused by the shifting of his deck-load, parting some of the seams (Apostles, pp. 262-3). The water also came in through the quick-work in such quantity as to drive the cook out. By that time the sea had become very rough, and finding difficulty in handling the water with the hand pumps, the master instructed the use of the steam pump. Some difficulty and delay occurred in getting the steam pump to work, owing, as the master states, to some piece of wood or other substance getting into the suction pipes, or something clogging the valves. The steam pump was finally straightened out and put to work October 6th. They found no mechanical trouble or broken parts about

the pump (Apostles, p. 266). The weather continued rough, with a strong wind from the southwest, until about noon, or a little later, on the 8th. By that time the steam pump had reduced the water two-thirds or more, and the master states that he would very shortly have had the vessel free of water. About noon of the 8th, however, a terrific gale came up from the northwest, the wind blowing about 100 miles per hour, and tore the ship's boats from the davits and threw the ship on her beam end. Her deck cargo shifted badly and was lost overboard, carrying the ship's masts and sails, and completely disabling her. The further incidents thereafter are detailed in full by Captain Swenson (Apostles, pp. 268-271). He and the crew stayed by the vessel throughout the 9th, 10th and 11th, when the crew refused to stay aboard longer and were taken off by the "David Evans" and the vessel left adrift.

The contention of appellant's attorneys is that nothing occurred between the time the vessel started on her voyage at Westport until she was waterlogged and dismasted that would account for the disaster to the vessel, and, therefore, argue that it must be presumed to have resulted from unseaworthiness at Westport when she loaded. We think

the mere statement of the incidents of the voyage as detailed by Captain Swenson is a complete answer to that contention. Before the vessel had gotten fairly started she went aground on the bar of the Columbia River, where she remained from high tide one day to high tide of the next day and was pulled off by the aid of two tugs. At that time she was heavily loaded and had a deck cargo of heavy timbers extending some nine or ten feet above the rail. It is perfectly manifest that the whole structure of the vessel was exposed to a tremendous strain during the time she was aground, and particularly at low tide, when the hull of the vessel was deprived of support. Even at high tide she was unable to float; and the pull given by the two tugs in relieving her exposed the structure of the vessel to an additional severe strain, carrying as she was an exceedingly heavy deck cargo. No trouble of any consequence from the inflow of water occurred until after the vessel struck fairly rough water and her deck cargo shifted. This shifting of the cargo, as stated by the master, was caused by the rough seas, and was immediately followed by an inflow of water under the break of the poop and into the storeroom, and also forward through the quick-work into the galley. This water evidently did not come from the open seam spoken of by Captain



Gibbs, because he states that any water entering through that seam would go down into the bilge.

Referring again to this alleged open seam and the testimony of Captain Gibbs respecting it, we call attention to the testimony of Captain Swenson (on page 288, Apostles) and Mr. Walker (on pages 352 to 357 of Apostles), relative to the construction of the ship, with which Mr. Walker was familiar, having been the owners' surveyor at the time she was built at Ballard. It is evident from this testimony that no considerable quantity of water could by any possibility have entered the ship from that source. It is also evident that, between the time this seam was examined by Captain Crowe and Mr. Walker on December 21st, and the time it was examined by Captain Gibbs, in May following, most of the oakum had worked out, or had been taken out of this seam.

It is also contended by appellant that, because the steam pump failed to work immediately when tried on October 4th, the presumption arises that it was in a defective condition at the commencement of the voyage, and that, if so, the vessel was unseaworthy. We contend, in the first place, that, even if the steam pump was in a defective condition at

the commencement of the voyage, this did not render the vessel unseaworthy.

The *California Civil Code*, Section 2682, defines "seaworthy" as follows:

"A ship is seaworthy when reasonably fit to perform the services and to encounter the ordinary perils of the voyage contemplated by the parties to the policy."

This vessel was equipped with the usual hand pumps, which were sufficient to handle the water ordinarily taken in by the vessel in such storms as she usually encountered on her voyages. The testimony shows that the steam pump had not been used in clearing the vessel of water since she was in port at Callao. This fact proves that the hand pumps were amply sufficient to enable the vessel to encounter the ordinary perils of the sea. She was a lumber carrier, and was not, therefore, required to be kept absolutely water-tight. The disaster in this case was due, not to the insufficiency of the pumps, but to the extraordinary force of the sudden gales and squalls encountered on this voyage. It was in no sense attributable to any failure of the pumps. The shifting of the cargo on October 4th, and the dismasting of the vessel on the 8th were the effects of the extraordinary heavy wind and sea. There is no reason to doubt that the same effect

would have resulted if the steam pump had been in perfect working condition. If, as we think the testimony shows, the hand pumps were sufficient to handle the water taken in by the ship and to enable her to encounter the ordinary perils of her contemplated voyages, then a defective condition of the steam pump, even if proved to have existed at the commencement of the voyage, did not constitute unseaworthiness.

We insist, however, that the testimony does not justify the inference that the steam pump was defective at the commencement of the voyage. It was tested by appellant's surveyors, both before and after the loading for this voyage. It was not attached to the hose leading to the bilges of the ship in these tests because there was no water in the bilges at that time, but the pump itself was operated to the satisfaction of the surveyors, lifting water from the side of the ship and working perfectly. The master states that the trouble with the pumps on October 4th was caused by some piece of wood, bark or other substance getting into the valves of the hose and temporarily clogging it. This inference is fair and reasonable under all the facts. When the pump was put in condition by the crew, it was found that there was no break in any of its parts and no mechanical defects, the trouble result-

ing from clogging at some point. The trouble was accidental and temporary and such as is liable to happen at any time to lumber carriers. Such occasional and temporary troubles or defects do not constitute unseaworthiness.

*The Mexican Prince*, 82 Fed. 484.

The burden of proving that the vessel was unseaworthy rested upon the Insurance Company (appellant) which relies upon it as a defense. The presumption of law being that a vessel is seaworthy until the contrary is proven.

*Thames & Mersey Marine Ins. Co. vs. Pacific Creosoting Company*, 223 Fed. 561 (decided by this court on May 10, 1915).

*Gow on Marine Insurance*, p. 273.

*Nome Beach Lighterage etc. Co. vs. Munich Assur. Co.*, 123 Fed. 820, 827 and cases there cited.

We confidently assert that this burden has not been sustained by the appellant.



(3) Even If There Was a Breach of the Implied  
Waranty of Seaworthiness, Does It  
Annul the Policy?

Undoubtedly, at common law, such would be the effect. But this policy is governed by the provisions of the California Civil Code. Section 2610 provides that:

“The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitles the other party to rescind.”

Section 2611 provides that:

“A policy may declare that a violation of special provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid it.”

In *Victoria S. S. Co. vs. Western Assur. Co.*, 139 Pac. 807, the Supreme Court of California held that this statute changed the common law, and that a breach of either an express or implied warranty did not avoid the policy, but, if it was “material”, it gave the other party a right to rescind. The wreck in this case was caused by sea perils, and not by a defective pump. It would have occurred if the pump had been in working order at all times. The warranty to have pumps in working order at the commencement of the voyage was therefore im-

material, as the loss did not result from a breach of that warranty.

If, however, it was material, the insurer had the right, under Section 2610, to “rescind”, but the policy was not avoided otherwise if it did not rescind. On the contrary, after knowledge of the failure of the steam pump to work when first tried—which knowledge it had from the surveyor’s report of December 21, 1911, and also from the other documents previously referred to—it took no action toward rescision, and has not rescinded to this day. A rescision, of course, required a return of the unearned premium, which has never been tendered. In fact, the answer of appellee did not set up a rescision; it alleged merely a breach of warranty, without any action by the appellant offering to rescind. Inasmuch as the decision in the *Victoria S. S. Co.* case was a construction of a state statute by the Supreme Court of that State, it is, of course, binding upon this court.

*Elmendorf vs. Taylor*, 10 Wheat 154 (6 L. Ed. 288 and note).

With respect to the defense of unseaworthiness, we respectfully submit: First, that the defense was waived by the appellant; second, that the vessel was fitted for encountering ordinary perils contemplated

by the voyage, with her hand pumps; third, that the evidence does not justify the conclusion that the steam pump was defective at the commencement of the voyage; and, fourth, that the appellant has never rescinded on account of the alleged breach.

## II.

### CONSTRUCTION OF POLICY.

It is now settled by the authorities that, inasmuch as these printed policies were gotten up by the insurance companies themselves, all doubtful, ambiguous clauses are construed most strongly against the insurance company and most favorably to the insured. Where two provisions in the policy are contradictory or inconsistent, the provision most favorable to the assured will be given effect. Where any part of the contract of insurance is in writing, it will supersede any printed provisions inconsistent therewith; any special riders or marginal clauses written on the policy are given effect as against any inconsistent provision in the printed form, and are assumed to have been intended to amplify, extend or restrict the printed form.

*London Assurance vs. Companhia*, 167 U. S. 149.

*Thames & Mersey vs. Pacific Creo. Co.*, 223 Fed. 561.

*Devitt vs. Prov. Wash. Ins. Co.*, 165 N. E. 777.

*Victoria S. S. Co. vs. W. A. Co.*, 139 Pac. 807.

*Western Ins. Co. vs. Cropper*, 32 Pa. St. 351.

*Risley vs. Ins. Co.*, 189 Fed. 529.

*Canton Insurance Office vs. Woodside*, 90 Fed. 301.

*National Bank vs. Insurance Company*, 95 U. S. 673.

As was said by Mr. Justice Harlan in the latter case:

“The Company cannot complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the Company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself.”

Let us apply these settled rules of construction to the policy in question. The section of the clause of the policy numbered “3d” reads as follows:

“Touching the adventures and perils which this Insurance Company is contented to bear, and takes upon itself in this Policy, they are of the Seas, Fires, Pirates, Assailing Thieves, Jet-tisons, Barratry of the Mariners (but not of the Master) \* \* \* and all other losses and misfortunes that shall come to the hurt or



damage of the vessel hereby insured, or any part thereof, to which insurers are liable by the Rules and Customs of Insurance in San Francisco, including the Rules for Adjustment of losses printed on back hereof and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this Policy.”

Clearly, this means that all losses and misfortunes for which insurers are liable by the provisions of the *Civil Code of California* are intended to be covered by this policy, except such particular losses and misfortunes as are expressly excluded by the terms of the policy itself. Partial losses are expressly excluded. Total loss, however, whether actual or constructive, is expressly included. It is not only included in the printed portion of the policy, but also in the added marginal clause. If there is any ambiguity in this policy considered as a whole, the construction most favorable to the assured must prevail.

The *Civil Code of California* defines a constructive total loss as one which gives the person insured a right to abandon, and Section 2717 provides as follows:

“A person insured by a contract of marine insurance may abandon the thing insured or any particular portion thereof separately valued by the policy, or otherwise separately

insured, and recover for a total loss thereof when the cause of the loss is a peril insured against: (1) If more than one-half thereof in value is actually lost or would have to be expended to recover it from the peril; (2) If it is injured to such an extent as to reduce its value more than one-half; (3) If the thing insured, being a ship, the contemplated voyage cannot be lawfully performed without incurring an expense to the insured of more than half the value of the thing abandoned, or without incurring a risk which a prudent man would not take under the circumstances."

Where constructive total loss is not excluded from the policy, then by clause 3 of this policy, the underwriter is liable for a constructive total loss such as is described and defined by the *California Code*. Aside from the marginal clause in this policy, there is a serious question whether Clause 3 of the policy is not in conflict with the 9th clause. It seems to us that there is a conflict between the two. By Clause 3, all sea losses for which an underwriter would be liable under the *Code of California*, are assumed by the insurer, except only losses expressly excluded by some other provision of the policy. Clause 9 does not undertake to exclude constructive total loss as a risk under the policy. The underwriter can exclude from the policy any losses or misfortunes whatever by so stating in the policy; but where by the policy he undertakes a stated risk, then, under Clause 3 of the policy, his liability is to

be determined by the provisions of the *Civil Code of California*. The effect of the reference to this Code in Clause 3 is to incorporate in the policy all of the provisions of that Code relating to the risks covered by the policy. Constructive total loss is a risk specifically covered. If the sections of the Civil Code defining a constructive total loss and defining the right to abandon had been set out in full in Clause 3 of the policy, instead of being incorporated merely by reference to the provisions of the Code, the inconsistency between Clause 3 and Clause 9 would be apparent. If these clauses are inconsistent, then the clause most favorable to the assured must be given effect.

So far as is shown in the reported cases, none of the cases cited by the appellant on page 37 of its brief contained any clause in the policy itself referring to a statute as defining the extent and nature of the liability for the losses covered by the policy. We do not deny the right of parties to contract with respect to marine insurance and to incorporate any legal conditions in the policy, as fully as in any other kind of contract; but clauses restricting liability where the liability would otherwise exist under the law must be free from ambiguity and consistent.

But the question in this case does not necessarily depend upon whether there is a conflict between Clause 3 and Clause 9, or whether there would be such ambiguity or uncertainty in these two printed clauses as to call into effect the rule of construction above mentioned.

The first printed clause in the policy expressly covers actual and constructive total loss, and expressly excludes partial loss or particular average. The vessel is valued at \$45,000. The uncontradicted testimony is that the vessel was worth only \$30,000, and that fact was known to both owner and underwriter at the time the policy issued. The valuation of \$45,000 was expressed in the policy at the dictation of the underwriter (Thorndyke's Testimony, Apostles pp. 337 and 338). Under those circumstances, and with these conceded facts, it became, of course, obvious to any intelligent owner that, although he was paying a premium for protection against a constructive total loss, he would not get such protection under the printed form of policy tendered, with the valuation insisted upon by the underwriter. In Clause 9, deducting one-third new for old from repairs, and one-third uninsured, it would require a damage to the vessel amounting to \$33,750 in order to con-



stitute a constructive total loss. When it is conceded that the vessel was worth only \$30,000, it is, of course, obvious that she could not possibly sustain a damage amounting to \$33,750. Under these circumstances, we find written on the margin of the policy this clause:

“This insurance is against total and/or constructive total loss of vessel including general average and/or salvage charges and/or claims under three-fourths ( $\frac{3}{4}$ ) running down clause.”

Appellant in its brief admits that total loss, both actual and constructive, salvage, general average and three-fourths of collision damages, were each and all covered by the printed body of the policy (Appellant's Brief, pp. 22-29).

That being true, why was the marginal rider added? Appellant says it was merely definitive—a restatement on the margin of the same risks stated in the printed policy, without addition, modification or qualification of those risks or of the conditions attached to them by the printed form. This construction gives no force whatever to the marginal clause and, in effect, eliminates it from the contract.

Manifestly, this endorsement was made for some purpose. It must be assumed to have been intended to amplify, extend or restrict the printed policy. It is ambiguous; but that ambiguity is the

fault of the underwriter. In clause 9 it is provided that a vessel shall not be abandoned unless the company would be liable to pay under an adjustment for partial loss for labor and materials "*exclusive of salvage or general average expense and the cost of funds*", etc. That evidently intends that, in a computation to determine a constructive total loss, salvage and general average expense shall be *excluded*. The marginal clause states that the insurance is against total or constructive total loss "*including general average and salvage charges and the three-fourths running-down clause*". This marginal clause may be construed as intending the insurance to cover actual and constructive total loss, *including* salvage and general average expenses in the computation, as contra-distinguished from the provision in clause 9 of that salvage and general average expenses shall be *excluded* from such computation. It is true that the same marginal clause includes liability under the three-fourths running down clause.

We recognize the difficulty in giving this construction to the written marginal clause suggested by appellant in its brief, that is, that it would apparently include claims under the three-fourths running-down clause in the computation of con-

structive total loss, and it is not usual to include those claims in determining constructive total loss. But appellant is itself responsible for the wording of the clause, and it cannot complain if effect is given to the words it has used. The word “*including*” which connects the total loss of the vessel and the general average and salvage charges, does not ordinarily suggest that the latter are separate risks. If it had been intended to state salvage and general average as separate risks in addition to total loss, the word “*and*” would have been used to connect them, instead of the word “*including*”.

The marginal clause is also capable of the construction that the insurance was against total or constructive total loss as defined in the *California Code* and the General Marine Insurance law, and was also intended to cover general average, salvage, etc. If the total and constructive total loss stated in the margin is the same loss covered by the printed policy, it was useless and senseless to repeat it on the margin.

Keeping in mind that the underwriter had exacted a valuation in the policy of \$45,000 on a vessel then known to be worth only \$30,000, and that, under Clause 9 of the policy, constructive total loss was an impossibility under the policy as it then

stood, it seems reasonable to assume that the marginal clause was added in order to give the owner the protection which he was paying for with his premium, that is, substantial protection against total or constructive total loss of this particular vessel under the facts known to both parties. It is a fair inference that the owner was not willing to accept the printed policy for the reason that it afforded no real protection against constructive total loss, and he insisted upon a marginal clause that would give him substantial protection; and it is not altogether beyond belief that the underwriter at that time, in view of the known over-valuation of the vessel in the policy, designed this marginal clause to afford real protection to its customer. Under that construction, the valuation in the policy would affect merely the proportion of salvage, general average and sue and labor expenditures for which the insurer would be liable.

We do not charge that the printed form of policy, under ordinary circumstances, operates as a fraud. Clause 9 undoubtedly imposes harsh restrictions upon the assured, in that it requires a loss of 75 per cent of the policy value in order to constitute a constructive total loss, as against 50 per cent of actual value, in ordinary policies. But it is entirely legitimate for the underwriter and owner to



contract, and if they do enter into a contract requiring a 75 per cent damage to constitute a constructive total loss, both parties understanding the contract, and there being no other clauses inconsistent therewith, there is no fraud involved. But if the underwriter inserts and insists upon a valuation known to be largely in excess of the actual value, so that 75 per cent of that amount is in excess of the known value of the vessel, and induces the owner to accept such a policy under the belief that he is securing protection against the risk of a constructive total loss, we think it is a palpable fraud; and we are willing to believe that the underwriter in this instance was not willing, and did not intend, to perpetrate a fraud, and, therefore, made this written marginal clause covering constructive total loss as known in General Marine Insurance, in order to afford the real protection it was pretending to give.

*Risley vs. Ins. Co.*, 189 Fed. 529.

*Leeds vs. Ins. Co.*, 8 N. Y. 351.

*Harper vs. Ins. Co.*, 17 N. Y. 194.

*Harper vs. Ins. Co.*, 22 N. Y. 441.

## III.

## ACTUAL TOTAL LOSS.

The testimony of both Thorndyke and Walker is to the effect that the wreck, as it lay in Astoria, on October 16th, was absolutely worthless as a vessel, and had no value except for the junk value of its material (Apostles 181-2, p. 194). This testimony is not contradicted by any other witness. It is confirmed by the fact that, after an expenditure of \$5,780, as shown by the statement of Johnson and Higgins, after deducting the salvage award, and the expenditure of the other sums noted by them but charged in their statement to the owner, the vessel free of all these claims was considered by the parties to be worth only \$5,000. The stipulation, found on page 386 of the Apostles, fixes the value of the vessel, on April 15, 1912, at \$5,000. This was after the payment of the salvage award, and was considered the value of the vessel free and clear of all claims (Apostles, p. 386).

Manifestly, the wreck had no value as a vessel at Astoria, on October 16th, if, after an expenditure of some \$7,000 was thereafter made in removing her to St. Johns, clearing her of her cargo, and entanglements, she had a value of only \$5,000. It also appears from the testimony of both Thorndyke and

Walker, which is uncontradicted, that the value of the vessel, after being repaired, would not have exceeded \$24,000 to \$25,000 (Apostles, pp. 182 and 194-5). No other valuation is given by any other witness. The Cornfoot bid, which was the lowest tendered, was \$20,950. There had been expended prior thereto, in order to place the vessel in a position where repairs were possible, the sums found by Johnson & Higgins, which, added to the Cornfoot bid, exceeds the repaired value of the vessel.

These facts show an absolute total loss of the vessel, if, as we contend, a damage so great as to destroy all value of the vessel as a vessel, so that it would cost more to put her in a condition for use as a vessel than she would be worth after repairs, is the correct rule of law. We realize that there is a conflict in the authorities upon this question. Of course, in such a conflict, any decision of the Supreme Court is controlling.

We think that this question is settled by the case of

*Insurance Co. vs. Fogarty*, 19 Wallace, 640. It is there distinctly held, after a review of the cases, that it is not necessary to a total loss that there should be an absolute extinction or destruction

of the thing insured. If the damage is such that the thing insured has no value for the use for which it was intended, and cannot be so repaired as to make it useful for that purpose, except at an expense exceeding its value, it is a total loss under the Marine Insurance Law.

In that case, pieces or parts of a machine, so made and shaped as to unite with other pieces, thereby making a complete machine, were insured for the voyage. The policy was against absolute total loss only. Some of these pieces of machinery were lost and the pieces that were saved were rusted and otherwise damaged and could not be repaired so as to make it practicable to use them for the purpose intended, except at an expenditure greater than their value. The Supreme Court held that this constituted an absolute total loss under the policy, although half in quantity of the thing shipped remained in specie, although damaged.

We deem it unnecessary to cite the various cases upon both sides of this question, for the reason that we consider this decision of the Supreme Court as settling the rule in the federal courts, but such authorities are found in 26 *Cyc.* 692.

There is no provision in this policy which changes the general rules of marine insurance relative to absolute total loss.



## IV.

## ABANDONMENT.

(1) Mr. Thorndyke testified that he abandoned this vessel to the underwriters, verbally, on Saturday, October 14th, and followed this up by written abandonment, on the 16th. Mr. Taylor contradicts this testimony as to the verbal abandonment on the 14th. This raises a pure question of fact. Taylor produced his diary, the entries in which indicated that he was in Tacoma during the afternoon of the 14th, and that he received notice at his residence in Seattle by telephone from some source of the loss of the "Nottingham" during the evening of the 14th. He has no recollection of the source from which he received the information, but his guess was that it came from the Merchants Exchange.

Mr. Thorndyke testifies that he gave the notice by telephone to Mr. Taylor, soon after receiving the information of the loss of the vessel, by long-distance telephone from Astoria; and he states that this information was given to Taylor during the afternoon of the 14th.

We do not doubt that both witnesses are testifying in absolute sincerity; and the fair inference from the admitted facts is that Thorndyke was

mistaken in his statement that he gave the information during the afternoon, and that he actually gave it during the evening; and that Taylor is mistaken in his guess that he got the information from the Merchants Exchange. The testimony on this subject was brought out some two years after the event. It is not reasonably to be expected that Mr. Thorndyke would accurately remember the exact hour or place when he conveyed this information, nor that Mr. Taylor would remember the person from whom he got the information. Thorndyke certainly received information of the loss of the vessel on the 14th; and it is a natural and fair inference that he would immediately notify the underwriter, as the most interested person. The criticism made by counsel for appellant upon Mr. Thorndyke's testimony in this respect is, we think, unfair and ungenerous. When Mr. Thorndyke was first examined as a witness, in July, he stated that immediately upon getting notice by long distance telephone, on Saturday, of the loss of the vessel, he conveyed the information to Mr. Taylor, and that he thereafter kept Mr. Taylor informed of all that transpired. In this examination, in July, the details were not called for by the questions put to Mr. Thorndyke (Apostles, p. 170).

If the statement of Mr. Thorndyke is true that he verbally notified the underwriter of the loss of the vessel, on Saturday, and abandoned to the underwriter, or, as he expressed it, told them that the vessel belonged to them, there is no question about the liability of the appellant for a constructive total loss. At that time the vessel was a derelict on the open sea and there was only a remote chance that she would ever be recovered.

*Peele vs. Insurance Co.*, Fed. Cases No. 10905.

Appellant's attorneys raise some question as to the form of this verbal abandonment. Verbal abandonment is authorized by the California Code (Sec. 2721) and words of transfer are not essential (Sec. 2722). Notice to the insurer that the vessel has been wrecked and abandoned at sea, and belonged to the insurer (Apostles, pp. 552, 560), is a fair compliance with the statute. In this connection we call special attention to the case of

*Victoria S. S. Co. vs. Western Assur. Co.*,  
139 Pac. 807,

for the reason that this is a decision by the Supreme Court of California, construing the provisions of the *Civil Code of California* governing the right of abandonment. That was an insurance upon freight against total loss only. The vessel was stranded and

the cargo was transshipped and forwarded to destination. The expenses of transshipping and forwarding the cargo, together with the loss of the freight on the cargo that was lost in the stranding, amounted to approximately one-half of the total freight. In other words, there was a real loss of approximately one-half of the freight which had been insured. There had been an abandonment of the vessel by her owner, but there had *not* been an abandonment of the freight by the owner of the freight. On this state of facts, the underwriter contended that there could be no recovery, as the policy was free from partial loss and particular average, and there had been no abandonment as to freight. The court quoted section 2705, to the effect that a constructive total loss is one which gives to the person insured a right to abandon, and then proceeds:

“It is not necessary under this section that there should be an actual abandonment. *It is sufficient to make a constructive total loss if the right to abandon exists.* This right to abandon exists with respect to freightage when the situation of the vessel brought about by one of the perils insured against is such that the cargo cannot be taken to its destination and the freightage be thereby earned without incurring an expense to the insured of more than half the value of the thing abandoned. With respect to this policy, the thing aban-



doned was the freight. The loss was caused by the stranding of the ship on a reef. There was an actual total loss and destruction of the ship and an actual abandonment thereof. No constructive abandonment was necessary as to the ship. Hence the freightage could be constructively abandoned notwithstanding the provision in Section 2717 that freightage cannot in any case be abandoned unless the ship is also abandoned. *The existence of the right to abandon so as to make a constructive total loss is determined by the situation at the time of the stranding.* The question is whether at that time it was reasonably possible to bring the cargo into port without an expense of more than half its value, if the insurance is upon cargo, or if it is upon freightage, without an expenditure of more than half the amount thereof." (Italics ours.)

If this is the correct construction of the *California Code*, then a technical abandonment was not necessary in the case at bar, and it was sufficient if the facts existing at the time the vessel was deserted as a derelict gave the assured a right to abandon as for constructive total loss as defined by this decision and the *California Code*.

It will also be noted that the court fixes the time for determining the right to abandon as the time of the stranding, which, by analogy in this case, would be the time when the vessel became wrecked and a derelict.

Appellant, in its brief (pp. 77-80), seeks to both discredit and distinguish this case, and refers to the decision of the Supreme Court above quoted as *dictum*. The action was to recover for a constructive total loss of freightage when there had been no abandonment as to the freightage; consequently, the question presented was, can there be a recovery for constructive total loss of freightage without abandonment? The decision of the exact question involved in the case cannot be waived aside as “*dictum*.”

Nor is the attempt of appellant to distinguish that case any more successful. It is clearly stated in the case that there had been an abandonment as to the vessel; therefore, the last provision in subdivision 4 of Sec. 2717, that “freightage cannot in any case be abandoned unless the ship is also abandoned”, could not have affected the decision. The ship had been abandoned, and there was therefore no obstacle to abandonment of freightage by the owner of the freightage, if he had wished to do so. Nor can it be argued that abandonment of the ship carried with it abandonment of the freightage. As stated in appellant’s brief (p. 80), the freight was not owned by the owner of the vessel. It is shown by the facts in the case that the cargo, or the

bulk of it, was forwarded to destination by a substitute ship, and a net earning of approximately one-half of the freight was realized. Under this state of facts, abandonment of freight was necessary, under general law. The decision that actual abandonment is unnecessary where the right to abandon exists, is a construction of the statute as applicable to any constructive total loss, whether ship or freight.

The statute, Sec. 2705, reads: "A constructive total loss is one which gives a person insured a *right to abandon* under Sec. 2717." The Supreme Court held that this statute means what it says—that if the "right to abandon" existed, there was a constructive total loss. Actual abandonment, by notice to the insurer, is not made essential by the statute to constitute a constructive total loss. If this is a departure from the principles of marine insurance law, as recognized at common law, the statute must prevail. The decision of the Supreme Court in construing the state statute is, of course, controlling in this court.

Appellant contends, however, that the right to abandon is determined by Clause 9 of the policy, and not by the statute. It will be noted that the Supreme Court states that "the existence of the

right to abandon so as to make a constructive total loss is determined *by the situation at the time of stranding*”. In the case at bar, the existence of the right to abandon so as to make a constructive total loss must be determined by the situation at the time the vessel was wrecked and deserted at sea and floating at large as a derelict. It will scarcely be contended that actual abandonment to the insurer at that time, before the wreck was picked up by salvors, would have been ineffectual.

*Peele case*, Fed. Cases, No. 10905.

If the right to abandon existed at that time, then, under the *Victoria S. S. Co.* case, there was a constructive total loss.

*Fulton Ins. Co. vs. Goodman*, 12 Ala. 108.

*Fulton Ins. Co. vs. Goodman*, 32 Ala. 126.

We understand the appellant to concede a constructive total loss if the marginal clause is construed as superseding clause 9 of the policy; or if its effect is to include salvage and general average charges in the computation; or if a right to abandon at the time of desertion of the ship made actual abandonment by notice to the insurer unnecessary, under the *Victoria S. S. Co.* case as construed by us.



**(2) Clause "9" Applicable Only Where Right to  
Abandon Is Predicated Solely Upon Physi-  
cal Damage to Vessel.**

We contend, further, that, in any view, clause 9 is applicable only where the right to abandon is predicated solely upon the amount of damages sustained, and has no application to the right to abandon in case of any other loss of the ship insured against. The policy insures against loss of the ship by "barratry of the mariners". If the crew deprived the owner of the possession, use and control of his ship by acts constituting barratry, the owner would have been entitled to recover under this policy a total loss, upon giving timely notice of abandonment, even though the ship itself had sustained no physical damage whatever; and it is obvious that clauses 8 and 9 would have no application whatever to that situation. The policy covers all losses and misfortunes from perils of the sea which deprive the owner of the possession and use of his vessel, save only capture and seizure, which are expressly excepted. Loss of possession or use of the vessel by embargoes, blockades and arrests, or by total submersion, or any other peril of the sea which actually deprives the owner of possession, are all perils or risks assumed by the 3rd clause of this policy.

2 *Arnould on Insurance*, Sec. 1011, (9th Edition).

*Peele Case*, Fed. Cases, No. 10905.

In the case at bar, the vessel was lost to the owner when she was wrecked and became a derelict. When she was brought into Astoria she was in the hands of salvors who had the sole and exclusive possession of the vessel and were asserting a claim against the vessel and cargo for about \$34,000. The owner could not regain possession of his vessel at that time, except upon the condition of giving a bond for the payment of any salvage that might thereafter be awarded against the vessel and cargo. Preliminarily, the bond would have been fixed in excess of \$34,000. It is true that the owner might have applied to the court and have secured the fixing of a bond in a lower sum by the appointment of appraisers to value the vessel. This would have taken time, and, in any event, the owner would have been required to assume an obligation to pay in the future whatever sum might be awarded for salvage. It was impracticable to make any accurate appraisement of the vessel and cargo at Astoria under the conditions existing at that time, so that it would have been necessary for the owner to have borne the expense and risk of taking the vessel to St. Johns and having her discharged so that the

appraisers could ascertain the amount of cargo aboard and intelligently appraise the value of the wreck.

It is our contention that, under the *California Code* and under the General Marine Insurance Law, there is a *constructive total loss whenever the owner is deprived of or loses possession of his vessel by a peril insured against, and cannot regain possession except upon terms that are onerous or such as a prudent owner would not undertake*. Clause 9 of the policy has no reference to the right to abandon for a constructive total loss in case of the loss of possession of the vessel by barratry or other peril covered irrespective of physical damage. That clause is applicable only when the abandonment is made on account of the extent of damages to the vessel. It is not applicable to any other kind of a loss. As stated above, the policy specifically covers barratry of the mariners. Now, if the crew should mutiny and take possession of the vessel, putting the master out of control, it would be a constructive total loss under this policy, although no damage whatever was done to the vessel. Clause 9 of the policy would be totally inapplicable to that situation. If the argument of appellant's counsel is correct, there can be no recovery for constructive total loss

without abandonment; and there can be no abandonment unless there is a physical damage to the vessel in excess of 75 per cent of the value stated in the policy. Under this reasoning, there could be no recovery if the vessel was lost to the owner by barratry of the crew or by seizure by pirates, or any other peril insured against not involving actual damage to the vessel itself.

If the contention of appellant is correct—and there can be no recovery for a constructive total loss of any kind unless there is a physical damage to the vessel, adjusted as provided in clauses 8 and 9—then these clauses are in direct conflict with clause 3; and all losses by barratry of the mariners, embargoes, arrests, seizure by pirates, total submersion of the ship, etc., not involving actual physical damage to the ship itself, are excluded from the policy.

This is, manifestly, an erroneous construction. Clause 9 of the policy must be limited so as to be applicable only where the abandonment is made on account of the extent of the damage sustained by the vessel of which a partial average adjustment could be made, and is not applicable to an abandonment on account of loss of possession, use and control of the vessel by one of the perils insured against not involving physical damage.



In the case of

*Cossman vs. West*, 6 Asp. 233 (N. S.),

the distinction between the nature of the possession of a derelict by salvors, and that of salvors in other cases where the vessel had not become a derelict, is clearly pointed out. The court says:

“In the case of salvors, there is a distinction between a derelict and a vessel which, though in great danger, has not been abandoned by the master and crew. *In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence. But, in an ordinary case of disaster, when the master remains in command, he retains the possession of the ship and it is his province to determine the amount of assistance that is necessary, etc.*  
\* \* \*

“In the present case, *the vessel, being a derelict, the salvors had the exclusive possession and control of it up to the time of the sale, and were not bound to give it up until they had been remunerated for the salvage services. Assuming that their possession is a constructive total loss but not an absolute total loss and that there was still a chance that the vessel might be redeemed and restored, the sale under the decree of the court removed all speculation on that subject and entitled the plaintiff to treat the case as one of total loss without abandonment.*” (Italics ours.)

There had been no abandonment in that case,

and it will be noted that the court assumed that the exclusive possession of a derelict by salvors constitutes a constructive total loss, and that if a sale by a decree of the court for salvage follows, the loss becomes actual total loss without any abandonment having been given.

Applying the doctrine of that case to the present case, we insist that when, by perils insured against, the vessel was reasonably and properly abandoned by the crew and became a derelict and was afterwards picked up and brought into Astoria by the salvors and was in their exclusive possession and control, the owner and master being excluded from any participation therein, the salvors asserting a salvage claim in excess of her value, there was a constructive total loss of the vessel at that time irrespective of the extent of damage she had sustained; and that, inasmuch as the owner gave notice of abandonment at that time, the underwriter is liable under this policy.

Constructive total loss may exist in the following situations resulting from sea disasters, as stated by Storey in the Peele case:

*Fed. Cases*, No. 10905.

“(a) Where there is a forcible dispossession or ouster of the owner of the ship, as by capture, etc.;

“(b) Where there is a restraint or detention which deprives the owner of the free use of his ship, as in cases of embargoes, blockades and arrests;

“(c) Where there is a present total loss of the physical possession and use of the ship, as in cases of submersion;

“(d) Where there is a total loss of the ship for the voyage, as in cases of shipwreck, so that the ship cannot be repaired in the port where the disaster happens;

“(e) Where the injury is so extensive, that by reason of it the ship is useless, and the making repairs would exceed her value.”

2 *Arn. on Ins.*, sec. 1099 (9th Edition).

Capture gives right of abandonment, because it deprives the owner of the possession of his ship, even though the vessel may be recaptured and restored, uninjured and unencumbered, the day after notice of abandonment (in America) or after action brought (in England).

2 *Arn.* 1099 (9th Edition).

*Rhinelanders vs. Insurance Co.*, 4 Cranch. 29.

In England, conditions justifying abandonment must exist both when notice is given and when action brought.

*Arnould*, sec. 1100 *et seq.*

In America, if conditions warrant abandonment

when notice given, subsequent events do not change the effect of the abandonment.

If, when abandonment is tendered, the possession and present use of the vessel has been lost to the owner by a peril insured against, but the vessel is in existence and where the owner can in time and on onerous conditions regain possession, does this fact deprive him of the right to abandon?

The rule established by the cases as given by *Arnould*, sec. 1105, is

“that the ship must be *in esse* in the country of the owner under such circumstances that he may, if he pleases, take possession of her, and may reasonably be expected to do so.”

See, also,

*Greene vs. Ins. Co.*, 9 Allen 217.

*Snow vs. Ins. Co.*, 119 Mass. 592.

In *McIver vs. Henderson*, cited in 2 *Arn.*, sec. 1105, the vessel was captured by the French, who, after taking her guns, stores, etc., gave her in charge to a Portuguese captain, and put the original English captain and part of his crew on board. The Portuguese captain took her to port and claimed her by gift of the French captors. The English captain resisted this claim and obtained a decree in his favor subject to appeal, deposited 427 pounds,



the proceeds of the cargo, to abide the appeal, secured the release of his ship, and returned with her to England. The vessel was then worth 1,300 pounds, having originally been worth 3,000. The expense of bringing the vessel to England was 221 pounds. The underwriters claimed this was a restitution of the vessel, inasmuch as the vessel was *in esse* and where the owners could immediately take possession, and the vessel had a present value of 1,300 pounds. The owner claimed that he could not retake possession without assuming a liability for the final result of the possible appeal in the prize case, which might exceed the present value of the ship. The court held:

“The mere restitution of the hull of the ship, if the assured may eventually have to pay more for it than it is worth, is not a circumstance by which the totality of the loss is reducible to an average one. \* \* \* It appears to us that there existed at the time of the abandonment, at the time of action brought, and that there exists at the present moment, circumstances fully sufficient to entitle the plaintiff to recover as for a total loss.”

It will be noted that the damage in that case was not sufficient to warrant abandonment for the amount of the damage alone under the English law; and that the right to abandon rested solely upon the fact that the owner had been deprived of the pos-

session and use of his vessel by a peril insured against, and could not regain immediate possession without assuming liability for the ultimate decision in the prize case on appeal, if an appeal should be taken, and that that liability might eventually exceed the value of the ship. In other words, that case decides that if the owner is once deprived of possession of the ship by a peril insured against, then, in order to defeat his claim for a constructive total loss, before abandonment, in America, or before action brought, in England, the vessel must be restored to him, or be placed where he can regain possession at once without assuming a liability which may eventually exceed the then value of the ship, in its damaged condition, under the English rule, or may eventually exceed fifty per cent of its then value, under the American rule.

Whether this deprivation of possession is by forcible capture by an enemy, by barratry or mutiny, or by desertion of the ship by the crew in case of derelict, is immaterial, so long as the cause is a peril insured against.

In *Thorneley vs. Hebson*, 2 B. & Ald. 513, the vessel became damaged by stress of weather and her crew deserted to another ship, but at the same time put eight men from this other ship on board and in

charge of the deserted vessel as salvors, and they ultimately brought her into port, before action was commenced, when her damage was found to be less than sufficient to constitute a constructive total loss. The court held the loss not total, first, because the owner had never really lost possession of the vessel, as the eight men placed on board and who brought her into port were in fact his agents; and, second, the owners, under the circumstances, ought to have taken charge of the vessel after she reached port, the salvage amounting to only two-thirds of the price she sold for.

In *Cossman vs. West*, 6 Asp. Mar. cases (N. S.) *supra*, the vessel was deserted at sea by the master and crew, owing to sea damage she had sustained, and became a derelict; and was afterwards picked up by salvors and taken into a safe port, where, after proceedings in court of which the owner had notice, she was sold to pay the salvage. The owner never tendered abandonment, but after the sale claimed against his underwriter for an actual or absolute total loss, and this claim was upheld by the court. The court distinguished the case from that of *Thorneley vs. Hebson*, *supra*, upon the ground that, in the Thorneley case, the owner never lost possession, as the possession of the salvors, put aboard

by the master, was a joint possession of the owner and salvors, whereas, in the case of a derelict picked up by salvors, as in the *Cossman case*, the possession of the salvors was sole and exclusive, and the owner could not regain possession for any purpose without giving bond or in some other appropriate manner assuming or giving security for such salvage as might eventually be allowed. In that case the salvage, as subsequently determined, did in fact exceed the amount for which the vessel sold. The court held that when the ship became a derelict, by a peril insured against, the owner lost possession, and a constructive total loss then existed; and that the owner could not reasonably be required or expected to regain possession after the vessel was taken into a safe port by the salvors, when, in order to secure possession, he would have had to give bond for the salvage, which might, when ultimately fixed, exceed the value of the vessel in her then condition.

The reasoning of the court in that case fairly implies that, if abandonment had been tendered (and action begun as required under the English rule) while the salvors were in exclusive possession of the vessel, it would have made a constructive total loss although the salvage award may have subsequently been fixed at a sum less than the value of the vessel.



The principle applied in the above cases is approved in

*Green vs. Ins. Co.*, 9 Allen (Mass.) 217.

*Snow vs. Ins. Co.*, 119 Mass. 592.

In this last named case, the vessel was insured for a whaling voyage. After reaching the North, the vessel was caught in the ice, damaged and threatened with total destruction. The master and crew deserted the vessel, and, upon their return to San Francisco, the owner gave notice of abandonment. In fact, the vessel had been picked up by salvors, and, at the time of the abandonment, she was safe in the hands of the salvors on her way to San Francisco, where she arrived in safety shortly after her owners had given notice of abandonment. The court held that the leaving of the vessel in the ice, made necessary by a peril insured against, was a constructive total loss and warranted an abandonment at any time before she was rescued—that her subsequent rescue by salvors, her master not having been able to resume possession of her, did not change the total loss to a partial one, but that there was still a constructive total loss of the vessel at the time of abandonment. This was a voyage policy, and, therefore, involved a loss of the voyage rather than a loss of the ship, and is, therefore, not entirely in

point; but it recognizes the principle of the English cases cited above.

In the case at bar, the vessel was damaged by perils insured against, was justifiably deserted by the crew and became a technical derelict; she was subsequently picked up by salvors, and brought into Astoria, and libelled by them for \$34,000. The salvors brought her into Astoria, on Sunday, October 15, 1911. Mr. Thorndyke testifies that he heard by long-distance telephone on Saturday, the 14th October, of the loss of the vessel, and notified the agent of the underwriter of the loss and intention to abandon, and followed that on Monday, the 16th, by formal written abandonment. Mr. Taylor, the agent, denies that he received any notice from Thorndyke on Saturday, but admits receipt of the formal written abandonment on Monday. If the notice of intention to abandon was given by Thorndyke on Saturday, while the vessel was still a floating derelict, it is apparently conceded that the abandonment was justified. We have discussed elsewhere this conflict in the evidence between Thorndyke and Taylor. For the present, we will assume that the abandonment was on Monday, and apply the established principles of law to the conditions existing at that time.

(a) And, first, it is clear that the *owner had lost the possession and use of his vessel by perils of the sea.*

(b) The vessel was not in a port of repair. It is proven and is not disputed, that the vessel could not be discharged of her cargo, dry-docked, surveyed nor repaired at Astoria.

(c) The vessel in her then condition, as she lay at Astoria, had no value as a ship, and was entirely innavigable, being worth only her break-up or wreckage value—which was not to exceed \$2,000.

*Walker's Tes.*, Apostles, p. 194.

*Thorndyke*, Apostles, pp. 181-2.

This evidence is not contradicted by the defendant, and must therefore be accepted as an established fact.

The stipulation of a value of \$5,000 (Apostles, p. 386), was made some five months later, after the vessel had been taken to St. Johns, discharged of her cargo, and fully surveyed. When the expenses incurred in taking the vessel to St. Johns and discharging her cargo, as shown in the statement of Johnson & Higgins, are deducted from the estimated value of \$5,000 at St. Johns, it clearly appears that the statements of Walker and Thorndyke as to her

value when lying at Astoria were correct. This, too, eliminates the risk involved in towing the vessel from Astoria to St. Johns.

(d) The salvors were in exclusive possession, and asserting a claim of \$34,000 against vessel and cargo. The vessel owner could not regain the possession and use of his vessel without making claim and executing bond to secure the whole amount of this salvage claim. As the cargo could not be discharged at Astoria, the vessel owner would have had to assume the liability for not only the vessel's proportion of the salvage, but for the proportion of the cargo as well, although he had no real interest in the cargo, the voyage having been broken up.

Having lost possession of his vessel by a peril covered by his policy, can it be said, under the authorities above cited, that the owner, on October 16th, 1911, under the circumstances just stated, "could, if he pleased, have taken possession of her, and could *reasonably be expected to do so?*" No reasonable man could be expected to assume a liability for an indefinite salvage award (claimed by the salvors to be \$34,000) to be fixed by the court at some future date, covering both vessel and cargo, in order to regain possession of a wrecked vessel, lying in a place where he could neither discharge,



survey nor repair, knowing the vessel to be practically worthless, and confronted with the certainty of expenses in getting to a port of repair in excess of her then value, and with the high probability that the cost of repairs alone, after reaching a port where repairs could be made, would be in excess of the repaired value of the vessel, even if she proved to be capable of being repaired at all.

The owner could not delay decision as to abandonment until the salvage claim was adjusted, nor even until the vessel reached a port where discharge and repairs were possible. He was required to decide promptly whether he would abandon and claim a total loss, or retain his right to the vessel and claim partial indemnity under other provisions of the policy. He cannot speculate by awaiting events, but must decide upon his election at once.

Under these circumstances, we respectfully insist that the abandonment was justified, even though the cost of repairs, as subsequently ascertained after reaching a port where the repairs could be made, should prove to be or should then be fairly estimated to be somewhat less than is specified in clause 9. The abandonment was justified upon the ground that the owner had lost possession of his vessel by a peril insured against, and could not regain possession at

that time without assuming liabilities which he could not reasonably be expected to assume.

### (3.) "High Probability" Rule.

When this vessel was wrecked and deserted, the owner was required to make prompt decision, after learning the fact, if the right of abandonment was claimed. The vessel being at Astoria in a wrecked condition, filled with water and in the hands of the salvors, the owner was required to immediately decide whether he would abandon to the insurer or waive his right to abandon. Delay would have amounted to a waiver. In the nature of things, he was required to act upon *probabilities* rather than certainties.

In the case of

*Peele vs. Ins. Co.*, Fed. Cases, No. 10905,  
Mr. Justice Story stated the American rule to be that the abandonment depends

"upon the facts and the judgment upon those facts at the time when it is made. It cannot remain in suspense nor be divested by subsequent events."

The rule is stated by *Kent* (3 Kent Com. 321) as follows:

"The right of abandonment does not depend upon the certainty but on the high probability of a total loss either of the property or

of the voyage or both. The insured is to act, not upon certainties but upon probabilities; and, if the facts present a case of extreme hazard and of probable expense exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense."

This rule is expressly approved by the U. S. Supreme Court in

*Bradley vs. Md. Ins. Co.*, 12 Peters 378, 397.  
and in

*Orient Ins. Co. vs. Adams*, 123 U. S. 67, 75.

The rule is also approved by the Circuit Court of Appeals of the 7th Circuit, in

*Royal Exchange Assur. vs. Graham etc. Co.*,  
166 Fed. 32.

If this rule is applied to the situation of the vessel at the time notice of abandonment was given on October 16, 1911, there can be no question that the abandonment was justified.

It was contended by appellant in the lower court that the rule of "high probability" does not apply under this policy because of the wording of clause 9. The language of this clause is:

"The insured shall not have the right to abandon the vessel unless the amount which this company would be liable to pay under an adjustment as of a partial loss for labor and materials (exclusive of salvage or general average ex-

penses and the cost of funds) shall exceed half the amount hereby insured."

The argument was that the rightfulness of the abandonment must be determined under this policy, not by fair judgment upon the facts at the time when abandonment was tendered, but upon the actuality of the extent of the damage as subsequently ascertained.

This contention leaves out of view entirely one of the elements entering into the question of the right to abandon, that is, the risk involved in getting the vessel to a port of repairs. But it is manifest that the amount which the insurer "would be liable to pay" under an adjustment for partial loss could be determined on October 16th, when the abandonment was made, only by estimating the probabilities as to the costs.

The case of *Hall vs. Ins. Co.*, 9 Pick. 466, supports the contention of appellee. It will be noted, however, that the Massachusetts Court does not place its ruling altogether on the conditions in the policy, but questions this condition as confirmatory of what it claims to be the general rule of law.

We think that the case of *Orient Ins. Co. vs. Adams*, *supra*, is decisive of this question. The policy in that case contained these conditions—that



there should be

“no abandonment as for a total loss on account of the said vessel grounding, or being otherwise detained, or in consequence of any loss or damage, *unless the injury sustained be equivalent to 50 per centum of the agreed value in the policy.*”

And also, that:

“In no case whatever shall the assured have the right to abandon until it *shall be ascertained* that the recovery and repairs of said vessel are impracticable.”

In other words, the policy required two things to warrant abandonment—a loss or damage equivalent to fifty per cent of the policy value and the ascertainment that the recovery and repair of the vessel was impracticable. The contention of the insurer in that case was

“that while the rule laid down by the (trial) court made the *probability of a stipulated loss* at the time of abandonment the test of the right to abandon, the policy made the *actual existence of the stipulated proportion of loss* the ground of the exercise of that right.”

This is also an accurate statement of the contention of the appellant in the court below upon the conditions in the present policy. The Supreme Court approved the instructions of the trial court, saying with respect to the *quantum* of loss or injury:

“While the damage must at the time have

been equivalent to 50 per cent of the agreed value, and while the fact that the repairs subsequently made amounted to only \$6,000 tended to show that the actual damage was not so great as claimed, that fact is not decisive of the right to abandon."

The court reaffirmed the "high probability" doctrine as laid down by Kent, and in *Bradley vs. Ins. Co.*, and held that doctrine applicable under the policy conditions above quoted.

It is manifest that the clause in the policy in that case, that no abandonment shall be made "in consequence of any loss or damage *unless the injury sustained* be equivalent to 50% of the agreed value," does not materially differ from the clause in the present policy so far as concerns the question now under discussion.

In the case of *Royal Exch. Assur. vs. Graham, etc., supra*, the policy provided that the right of abandonment "shall not exist *unless the loss exceeds one-half the value* of hull and machinery as stated in the policy."

Notwithstanding this policy provision that the right of abandonment should not exist unless the *loss exceeded* the percentum mentioned, the Court of Appeals applied the "high probability" rule in testing the justification of the abandonment. The

reasoning of the court, in making the application of this rule under the policy provision there involved, seems to us to be unanswerable. The owner is required to exercise the right of abandonment promptly; otherwise he waives it. From the very nature of these disasters to ships when lying in out-of-the-way places, with no opportunity to discharge cargo, put the vessel in dry dock or make a survey, certainty as to the cost of repairs or the expenses of taking the ship to a port of repairs cannot be had at the time the owner is required to decide whether he will abandon or not; and, therefore, certainty of results cannot be the test of the exercise of the right. And it, therefore, follows that the test is the *high probability that the cost will exceed the stipulated amount.*

**IS THERE A CONSTRUCTIVE TOTAL LOSS  
COMPUTED STRICTLY ACCORDING TO  
CLAUSES 8 AND 9 OF THE POLICY?**

FIRST. Mr. Wilfred Page has made a sample adjustment of this loss on behalf of the defendant, by which he arrives at the result that the liability of the defendant, adjusted as for a partial loss, is \$9,540.66 (Page's Tes., Apostles p. 478).

We are submitting, at the end of this brief, a statement of an adjustment of this loss, which shows a liability of the defendant upon an adjustment as for a partial loss, under clauses 8 and 9 of the policy, of a fraction over \$17,000. Any liability of the defendant in excess of \$15,000, under an adjustment as for a partial loss, constitutes a constructive total loss under clause 9.

In our statement, we have not differed with Mr. Page as to principles upon which the adjustment is to be stated; but we do differ as to the items to be taken into the computation.

The total of the items subject to the deduction of one-third new for old, as found by Mr. Page, amounts to \$18,913.65 (Apostles p. 477).

To this total we have added the following item, not considered by Mr. Page, viz.:

I. Hall Bros. bid for repairs called for by Walker's supplemental report. This bid totals \$5,245; but item 6 thereof was misunderstood by the bidders, and, when explained to them by Capt. Gibbs subsequently, they corrected their bid on that item from \$755 to \$277.50. The \$277.50 is included in Page's computation, and therefore the entire \$755 should be deducted from Hall's bid. Item 9 in Hall's bid is \$575 for resalting the vessel. Subsequently Gibbs and Walker agreed upon \$600 as the cost of resalting, and, as that item of \$600 is included in Page's computation, the \$575, item 9, should also be deducted from Hall Bros. bid. Gibbs and Walker also agreed to a further deduction of \$80 from Hall's bid on account of certain painting, and also certain other reductions totaling \$655.00 contained in Gibbs and Walker agreement dated March 27, 1912. (Tr. p. 470.) These deductions, amounting to \$2,065, taken from Hall's bid of \$5,245, leaves \$3,180 to be added to Page's total of \$19,568.65, subject to the usual one-third off new for old.

II. There should also be added the cost of supervising the repairs. Cornfoot's bid of \$20,950, which has been taken by Page as the measure of the cost of repairs, was upon the condition that he should have sixty-five days to complete the repairs.



The only witness who has testified as to the cost of supervision is Walker, who stated that an expert would cost \$25 per day, but that a competent non-expert would cost from \$10 to \$15 per day. We assume that the owner, if he did not employ an expert, would at least employ a first-class, competent non-expert to supervise so important a piece of work as this was, and we have therefore entered this item at \$975, being sixty-five days at \$15 per day. These two items, \$3,180 and \$975, added to Mr. Page's total of \$19,568.65, makes a total for the "one-third off new for old" column of \$23,723.65

Deducting one-third new for old, 7,907.88

Leaves for net column, \$15,815.77

1. To this net column Mr. Page adds \$201.89 as the vessel's proportion of bottom painting (Page's Tes., Apostles p. 477).

(We accept his distribution as to this item.)

2. He also adds \$1,500 for consumable stores lost, they not being subject to the deduction of new for old. He takes the \$1,500 from Cornfoot's testimony that he estimated the stores at this sum in making up his bid.

We agree with Mr. Page that the item of stores is not subject to the "new for old" deduction; but we contend that actual cost of

these stores is a more reliable basis for allowance than the loose estimate of Mr. Cornfoot. We will discuss the reasons for our contention later. Mr. Thorndyke, the general manager of the plaintiff company, purchased the stores aboard the ship which were lost, and he states that the actual cost was \$2,370.14. We have therefore added this sum to the net column, instead of the \$1,500 added by Mr. Page.

3. We have also added the expenses incurred on account of ship and cargo in removing the ship from Astoria to St. Johns, removing the cargo, and disentangling her from her complications. We will discuss the propriety of this item later.

These expenses, as adjusted by Johnson & Higgins, aggregate \$8,780; but this includes the salvage award of \$3,000, and, as salvage is excluded by clause 9 of the policy from this computation, we have deducted that amount from the total of \$8,780, leaving \$5,780 to be added to the net column under this head. Mr. Page omitted these items altogether on the theory that they are "general average" charges, and therefore excluded by clause 9. We will endeavor later on to show that they are not, technically, general average charges, although

the cargo was liable for its proportion of them.

4. We have also added an item of \$1,554.78, being expenses incurred on behalf of the ship alone, as found by Johnson & Higgins. We do not understand why Mr. Page ignored these particular average expenses, as they are unquestionably chargeable in an adjustment as for partial loss. An itemized statement making up this \$1,554.78, as taken from Johnson & Higgins' statement of adjustment, is attached to our detailed statement.

These four items, \$201.89, \$2,370.14, \$5,780 and \$1,554.78, added to the previously ascertained net column above of \$15,849.10, makes a net total of \$25,755.01, and the underwriter's 30/45 thereof is \$17,170.61.

Whether there was a constructive total loss, computed strictly under clause 9 of the policy, depends therefore upon whether the items we have added, as shown above, should be taken into the computation. We will discuss them in the order stated.

A. The first item added by us is that of \$3,885 to the "one-third off new for old" column, being the bid of Hall Bros. for the repairs called for by

Walker's supplemental report, after making proper deductions.

This is altogether a question of fact. The owner was entitled to such repairs as would restore his vessel to as good condition as it was in before the damage occurred.

Mr. Walker, who acted as expert marine surveyor for the owner, and whose competency is admitted (See Gibbs' Tes. Apostles pp. 413-4), testified that the repairs called for by this supplemental report and covered by Hall Bros.' bid, were made necessary by the disaster, and that she could not be put in as good seaworthy condition as she was in prior to the accident without making these repairs (Walker's Tes. Apostles pp. 350-1, pp. 357-8).

This testimony is not directly contradicted by any other witness. It appears from the record that on March 27, 1912, Capt. Gibbs, the marine surveyor of defendant, went over both the original and supplemental surveys and specifications with Mr. Walker, and accepted some of the items in the supplemental report but declined to agree to the necessity of the items making up this \$3,885.

At that time, however, Capt. Gibbs had not surveyed nor even seen the vessel (Gibbs' Tes. Apostles p. 430).

Afterwards, on May 2d and 3d, Gibbs did examine the vessel. In his testimony he does not state that the repairs called for by this supplemental report were not necessary to restore the ship to her previous condition. The most that can be claimed from his testimony is that his refusal to agree to these particular items in the supplemental report is, impliedly, an expression of opinion that these damages were either not caused by the sea disaster, or the repairs were unnecessary to restore the vessel. This refusal by Gibbs to agree to these repairs, however, was not under the sanction of an oath. If Gibbs in fact believed that these repairs were unnecessary, it would have been an easy matter for defendant to have his statement to that effect on the witness stand under oath. It appears that both Gibbs and Page went to Portland with Walker about May 2nd for the ostensible purpose of examining the vessel in order to determine whether the underwriter would agree to these repairs, and that they had Walker's supplemental report with them (Gibbs' Tes. Apostles pp. 430-1-2).

Under these circumstances, the failure of both Gibbs and Page to state under oath that these repairs were not necessary, or not occasioned by sea peril, is most significant.



We insist, therefore, that Walker's statement that these repairs were rendered necessary by the disaster and were essential to restore the vessel to a good seaworthy condition, stands absolutely uncontradicted, and establishes that fact in the case.

If these repairs were necessary as a result of the disaster suffered by the vessel, it follows as a matter of course that the estimated cost thereof should be computed in determining whether there was a constructive total loss.

It will be noted that Mr. Walker insisted upon these repairs at the time he and Capt. Crow, who was acting for the underwriter at that time, made their original survey and specifications; but Capt. Crow refused to agree to them or sign a survey report containing them; consequently Mr. Walker signed the joint report containing the specifications agreed to by Capt. Crow—which is Plff's Ex. I—and later made to the owner this further and supplemental report, which is Plff's Ex. J. (Walker's Tes. Apostles pp. 357-8, pp. 188-9, 350-1.)

Mr. Walker has consistently contended that the repairs called for by this supplemental report, and upon which Hall Bros. submitted their bid, were absolutely necessary to restore the ship to her former condition.

The modification of certain items of these supplemental specifications by the stipulation on pp. 348-9, cited by appellant's attorneys, does not materially affect these estimates. Mr. Walker had explained that the duplications in his supplemental report of work covered by the original specifications amounted to only a small per cent thereof (Walker's Tes. Apostles p. 222).

This partial duplication was the subject of the agreement, and did not exceed five per cent (Apostles pp. 229-230).

B. The next item added by us to Mr. Page's total in the "one-third off new for old" column is the sum of \$975 for expenses of supervision of the repairs. It is computed at \$15 per day for sixty-five days, the time called for in the Cornfoot bid.

It is customary for owners to provide a competent man to supervise ship repairs being made under contract; and the wages of such supervisor is computed as a part of the labor expense in adjustment as for partial loss.

"A fair allowance for superintendence and for the custody of the vessel, if necessary, while the repairs are going on, should be made, which allowance is to be charged to the account of labor, from which one-third is to be deducted; but wages and provisions of officers and crew, while the ship is undergoing repairs, are not

to be computed as part of the particular average."

*Hall vs. Ocean Ins. Co.*, 21 Pick. 472, 482.

"As the repairing of a vessel at a port other than her home port involves the ship-owner in certain expenses for the superintendence of repairs, these are allowed by the underwriters when the cost of the repairs is such as to constitute a claim under the policy."

*Gow, Mar. Ins.*, p. 219.

Portland was not the home port of this vessel, and the cost of superintendence is therefore allowable as a part of the labor expense.

C. The next item in dispute is that of stores lost or destroyed. Mr. Page allows \$1,500, which was Cornfoot's estimate for this item in making up his bid; we claim \$2,370.14, which was the actual cost, as shown by Thorndyke.

D. The next item added by us to Mr. Page's "net column" total is the sum of \$5,780, being the expenses incurred after abandonment to the underwriter in taking the vessel from Astoria to St. Johns, discharging the cargo, disentangling the complications so as to regain possession of the vessel and put her in a position where repairs could be made. We do not understand there is any dispute as to the fact of these expenditures. Both Mr. Clise and Mr. Thorndyke testified to the expenditures, and

they were approved by Johnson & Higgins, the adjusters, and the appellant accepted the items in the adjustment and paid a proportion thereof.

The total of these expenses for the joint rescue of vessel and cargo, as shown by Johnson & Higgins' adjustment, aggregate \$8,780. The 9th clause of the policy excludes from the computation to determine a constructive total loss "salvage or general average expenses and cost of funds."

The services rendered by the salvors of this vessel were strictly salvage services rendered prior to abandonment and the \$3,000 allowed by the court to the salvors and included in this total of \$8,780 we treat as a salvage expense under clause 9 of the policy. We have therefore excluded that item from the computation.

The remainder, \$5,780, is treated by the defendant as "general average expenses," within clause 9, and consequently to be excluded from the computation. We do not consider these as general average expenses, under clause 9 of the policy.

The fault in appellant's position lies in the assumption that expenses incurred by the shipowner after abandonment and after the vessel reaches a port of refuge which is not a port of re-

pair are strictly general average expenses, because the vessel owner, upon incurring such expenses for the common benefit of vessel and cargo, has a right to recover the cargo's proportion thereof from the cargo owner.

There are two questions involved, first, are these expenses technically general average expenses, within the meaning of clause 9 of the policy; and, second, if not, then is the vessel-owner entitled to take into the computation the whole of such expenses, or should the proportion thereof collectible by the vessel-owner from the cargo be excluded? That such expenses are not strictly general average expenses within the meaning of the so-called "Boston" clause, or clause 9 of this policy, is well settled by the authorities.

*Seward vs. U. S. Ins. Co.*, 11 Pick. 90.

*Greeley vs. Ins. Co.*, 9 Cush. (Mass.) 415.

*Wallace vs. Ins. Co.*, 22 Fed. 67.

*Royal, etc., Assur. vs. Graham, etc.*, 166 Fed. 32.

*Ellicott vs. Ins. Co.*, 14 Gray (Mass.) 318.

*Young vs. Ins. Co.*, 24 Fed. 282.

These expenses were incurred after abandonment to the underwriter, but were such as, at the time abandonment was made, were foreseen and con-



templated, and necessary, if the vessel was to be repaired or the cargo saved.

*Harvey vs. Ins. Co.*, 79 N. W. 900.

*Gilchrist vs. Ins. Co.*, 104 Fed. 566.

*Mason vs. Ins. Co.*, 110 Fed. 455.

*Insurance Co. vs. Stark*, 6 Cranch. 268.

It is also settled by the decided weight of American authority that the owner is entitled, on a partial loss, to recover the whole expense from his underwriter, in the first instance, and leave the underwriter to recover the proper proportion from the cargo owner; and the same rule applies in determining whether the amount of the loss is sufficient to constitute a constructive total loss.

*Muggorth vs. Church*, 1 Caine's Rep. (N. Y.) 215.

*Pezant vs. Ins. Co.*, 15 Wend. 453.

*Potter vs. Ins. Co.*, Fed. Case No. 11335.

*Watson vs. Ins. Co.*, 7 Johns. R. 57.

*P. & S. S. Co. vs. P. Ins. Co.*, 89 N. Y. 559.

*Int. N. Co. vs. Ins. Co.*, 100 Fed. 304.

2 *Phillips, Mar. Ins.*, Sec. 1545.

2 *Arnould Mar. Ins.*, Sec. 1125.

*Cal. Civil Code*, Sec. 2745.

These expenses were incurred in order to get the vessel to a port where it was possible to repair

her; to get the cargo discharged, as repair was otherwise impossible; and to get actual possession and control of the vessel, which was necessary preliminary to any repair. All of these expenses, except only the cost of discharging the cargo, would have been necessary in order to place the vessel in a position for being repaired, if she had had no cargo aboard.

They were, as stated in the *Sewall case*, in the nature of, but not technically, general average; the adjustment was simply an apportionment between vessel and cargo, as the cargo had been incidentally benefited. As pointed out in the *Wallace case*, such expenses are, in a sense, in the nature of, although not technically, "sue and labor" expenses, as the entire property would have been utterly lost to both parties if they had not been incurred.

The payment by the insurer of a part thereof was a payment of part of the expenses incurred in taking care of his own property, as the vessel belonged to him after proper abandonment. As the ship could not be repaired and restored to the owner without these expenses being incurred, they must be computed in determining constructive loss.

E. The next and last item added by us to Mr. Page's net column total is \$1,554.14, being expenses

incurred by the owner in these rescue operations which were incurred for the benefit of the vessel alone. They are a part of the expenses necessarily incurred in putting the ship in a place where repairs were possible and in taking care of her during that time. The principle under which we claim this item is sufficiently covered by our previous discussion under head D. If the expenses incurred for the joint benefit of vessel and cargo are chargeable, certainly the expenses incurred on account of the vessel alone should be.

If the principles contended for by us are sustained, then the statement we have submitted shows a liability of the underwriter, on adjustment as for a partial loss, of \$17,170, which is some \$2,000 in excess of the amount necessary to constitute a constructive total loss.

We will not enter into a detailed discussion of the various items making up the \$5,780 and \$1,554 rescue expenses. They were all allowed by Johnson & Higgins; and the items making up the \$5,780 were accepted by both this appellant and the cargo owners. So long as negotiations are pending between the owner and underwriter in good faith for a determination of the nature and extent of the loss and practicability and advisability of

repairing the vessel, the expenses incident to preserving the property from further loss and caring for it, are admissible expenses.

*Hall vs. Ins. Co.*, 21 Pick. 472.

Any other rule would result in useless waste and loss to the property in which both are interested.

SECOND. In the discussion thus far of the question of constructive total loss strictly under clause 9, we have treated the Cornfoot bid of \$20,950 as the measure of the cost of the repairs covered by the original Walker-Crowe specifications. We deny, however, that we are bound by that bid.

The repairs were never actually made; and the bids submitted by the four bidders were merely their respective estimates of what the cost would be. The question, in the last analysis, is, what was the "high probability" of the actual cost, based upon the condition of facts existing when the abandonment was tendered?

(a) The first fact to be considered was the risk incident to towing the vessel, in her then condition, from Astoria to St. Johns. If she had stranded on any of the river bars, she would probably have broken up, in her weakened state at that time. She did strand coming down the river, and, in our opin-

ion, it is absurd to contend that this movement of the vessel involved no risk. Captain Gibbs, defendant's expert, says there was no real risk involved in this towage (Gibbs' Tes. Apostles pp. 401-2). Walker says it did involve a real risk (Walker's Tes. Apostles p. 229).

The established and undisputed fact, as shown by Clise's testimony (Apostles pp. 341-2), is that the salvors considered that the towing involved a material risk, and they refused to consent to it; the United States marshal would not assume the risk; and the court at Portland would not order or sanction the operation except upon the condition that the salvors be fully indemnified by bond against the risk. At that time, the appellant apparently considered that a risk was involved, because it refused to join the appellee in giving this indemnity bond.

(b) In exercising judgment upon the facts existing at the time of the abandonment, consideration must be given to the value of the vessel as compared with the costs incident to placing her in a place and condition where repairs would be possible. Walker and Thorndyke testify that the vessel, on October 16th, had no value as a vessel except her break-up value. This is not contradicted by any other witness. After the vessel was moved to St. Johns,



discharged, and surveyed, she was considered by the parties to have a value of approximately \$5,000, as shown by Tr. p. 349. In the statement by the average adjusters, her contributive value was placed at \$8,500. The expenses of placing her in that position, as hereinbefore stated, amounted to \$5,780, plus \$1,554, in addition to the salvage award of \$3,000.

(c) The other fact to be considered, in determining whether to abandon or not, was the question of the cost of repairs. Even if the vessel had been subsequently repaired, so that the actual cost was definitely settled, that would not be decisive of the rightfulness of the abandonment. This is expressly so held in *Orient Ins. Co. vs. Adams, supra*, and in *Royal Ex. Assur. case*, 166 Fed., *supra*... Not having been repaired, the cost of repairs must be estimated. As stated before, there were four bids on the original specifications, exclusive of the repairs called for by the supplemental report as follows:

Oregon Dry Dock Co.....	\$25,200.00
Vulcan Iron Works .....	\$24,600.00
St. Johns Shipbuilding Co.....	\$23,070.75
Albina Eng. & Mch. Works, Cornfoot .....	\$20,950.00

Cornfoot also modified his bid by offering to

reduce the time from sixty-five to fifty-five days for an additional \$1,000.

Is there any reason to assume that the Cornfoot bid more correctly measures what the cost of repairs would have been than does the bid of the Oregon Dry Dock Company? It is not a question of what somebody will do the work for. If some one had offered to do the work for less than cost, in order to aid the underwriter in escaping liability for a total loss, surely such a bid would not be the proper measure of cost. If the damage to the vessel was such that an accurate estimate of the actual cost of the repairs would equal the sum necessary to constitute a total loss, neither the subsequent payment of a part of such costs by the underwriter, nor a subsequent mistaken estimate of what the repairs would cost, will reduce a total to a partial loss. (2 *Arnould, Marine Ins.*, Sec. 1126, 9th Ed.)

These various bids are all competent evidence as bearing upon the question of the probable cost of repairs; but the question remains one of fact, to be determined by all of the evidence.

When all of these circumstances are considered, and the rightfulness of the abandonment tested by them, as of the date the abandonment was made, we

think there can be no reasonable doubt that the appellee was entitled to abandon under the strict terms of clause 9. The appellee was required to abandon or waive its right to abandon on October 16th. Bids for repairs could not be obtained at that time, because of the condition of the vessel and her situation in Astoria, where she could not be discharged nor surveyed. In exercising its judgment at that time upon the facts as they then existed, the appellee could not foresee that the supplies aboard—for illustration—which had cost, two weeks before, some \$2,300 or \$2,400, could be replaced for \$1,500 through careless estimates or over-anxiety to secure the work on the part of some contractor.

If these various bids are to be considered as the opinions of the several bidders as to what it would cost to make these repairs, then, assuming them to be equally honest and competent, the composite of all of the estimates is a fair basis for judgment upon the question of the probable cost. Where the owner has already abandoned, he should not be concluded by the subsequent bid of one man, when three others, equally competent, place a much higher estimate upon the cost. A bidder may be influenced to make a bid below actual cost in

order to provide work for his plant, and be willing to take a loss on the work rather than suffer a greater by permitting his plant to stand idle and his employees to seek employment elsewhere; he may also be influenced by a desire to aid underwriters in escaping a claim for total loss in order to secure their favor and patronage in other work later. In a case where the owner, as agent for both parties, in letting a contract for particular work, he is required to accept the best responsible bid offered, because he is not injured by an underestimate by the bidder, and his agency for the insurer requires him to secure the best results for his principal so long as the interests of the agent are not prejudiced. But where abandonment has been tendered and rejected, and the insurer and owner are antagonistic, and the owner is contending that the abandonment was justified when made, a different situation exists and different principles apply, and offers to make the repairs submitted by different contractors are merely their several estimates of the cost.

Appellant further contends that there is no evidence in the record by which the segregation of the costs under any of these other bids can be made, so as to make deductions in accordance with

clauses 8 and 9 of the policy; and the decision in *Soelberg vs. Ins. Co.*, 119 Fed. 23, is cited as controlling.

Keeping in mind that the abandonment is to be determined by the facts existing at the time it was made, and that therefore absolute certainty as to the result is not possible and is not required, we think the classification or segregation of the Cornfoot bid in the evidence can be taken as a reasonably safe guide in considering the other bids, and a fair and reasonable result obtained by applying to the different items in the Cornfoot bid, as segregated by him, the percentage of increase of the other bids over the Cornfoot bid. Mathematical accuracy is not required.

## VI.

It is contended by appellant that, in event of decree going against it, it is entitled to a credit for the amount paid on the Johnson & Higgings statement. We think not. If the owner rightfully abandoned in October, 1911, he was then entitled to \$30,000, and the wreck belonged to the underwriter. The expenses subsequently incurred, in endeavoring to save something from the wreck, were incurred for the benefit of the underwriter as the then owner of the wreck. It is entitled to the wreck, or its



proceeds, but is not entitled to the thing saved and also re-imbursement of the expenses incurred in saving it. The owner is not required to bear the expense of saving a further loss, after he had properly abandoned.

Appellant's criticisms upon the opinion of the court below are, we think, hypercritical. The court used the general expression "one-third off new for old," as expressing, in a short way, the deductions contemplated by the policy. This expression is frequently, we might say almost uniformly, used by courts and text books as a manner of stating the deductions to be made in partial average adjustments. It is not literally accurate, whether considered with reference to this policy or to the general rule under English forms of policies. There is never any deduction from stores, anchors, new sails, and unused equipment carried as reserve, *et cetera*; but the expression "one-third off" is generally used to express the deductions to be made under the policy, whatever they are. But we do not deem it necessary to closely analyze the forms of expression used by the trial court nor to consider whether each detached sentence can be justified under the authorities. If there was a total loss, either actual or constructive, the judgment must be affirmed.

## VII.

It was contended by appellant in the lower court that recovery for actual total loss could not be had under the pleadings in this case. The libel (paragraph XII) alleges that the voyage was broken up, "and said schooner and her outfits, \* \* \* \* were totally lost by the perils of the sea and perils insured against," etc. The prayer is for judgment for \$30,000 damages "on account of the loss of said schooner," etc.

This is sufficient to authorize a recovery for either actual or constructive total loss.

*Snow vs. Ins. Co.*, 119 Mass. 592.

We have endeavored to discuss the several questions involved in this case—those discussed by appellant and others essentially involved—but without any attempt to follow the order of appellant in its brief. Speaking broadly, we have this case: A vessel worth \$30,000, and valued in the policy at \$45,000, was insured for \$30,000 against actual or constructive total loss; she was wrecked by sea perils, deserted and became a derelict, picked up by salvors and held under a claim for salvage in excess of even her repaired value. After the disaster, and when abandoned by the owner to the under-

writer, she had little, if any, value; and, after reaching a port of repair and discharging cargo, and incurring expenses of several thousand dollars, her value was, at the most, only \$5,000. The underwriter claims that there was neither an actual nor a constructive total loss. The mere statement of the case shows that the position of the appellant is contrary to all principles of marine insurance. If a damage to a vessel by a peril insured against reduces the value of that vessel from \$30,000 to \$20,000, or even to \$5,000, does not make a case of constructive total loss, under the terms of this policy, then the pretense that it afforded the owner protection against a constructive total loss of his vessel, so prominently stated on the margin of the policy, is a delusion and a snare, and the exaction of a premium for protection which the policy did not give, was a fraud.

Respectfully submitted,

H. R. CLISE,

CLISE & POE,

BOGLE, GRAVES, MERRITT & BOGLE,

*Proctors for Appellees.*

## ILLUSTRATIVE STATEMENT REFERRED TO IN FOREGOING BRIEF.

Items to be computed under clause 9 of policy, in determining constructive total loss, referred to in foregoing brief of appellees:

1. Items subject to deduction of one-third "new for old:"	
(a) Items in Cornfoot's bid, admitted by Page (Tr. p. 475).....	\$18,563.00
(b) Salting vessel, admitted by Page, Gibbs & Walker.....	600.00
(c) Caulking stanchions, agreed upon by Gibbs & Walker, and admitted by Page (R. p. 470).....	277.50
(d) Dockage dues chargeable to vessel, conceded by Page (R. p. 473)	128.15
(e) Additional repairs necessary to fully restore ship, shown by Supplemental Survey Report by Walker—Hall Bros.' bid after deducting items 3, 6 & 9), covered by Gibbs & Walker agreement, and their supplemental agreement..	3,180
(f) Supervision during 65 days of repair at \$15 per day.....	975.00
	<hr/>
	\$23,723.65
Deduct one-third "new for old".....	7,907.88
	<hr/>
Forward.....	\$15,815.77

2. (a) Add expenses charged by Johnson & Higgins to general average on vessel and cargo, \$8,780, less the salvage award, \$3,000.....\$ 5,780.00

(NOTE.—These expenses, although termed general average for convenience, are not strictly general average, within the meaning of that term in clause 9 of policy, and are all chargeable as expenses incident or necessary to repair and restore vessel.)

*Wallace vs. Ins. Co.*, 22 Fed. 66, 70.

*Seward vs. U. S. Ins. Co.*, 11 Pick. 90.

The American rule is that the whole of such expenses is to be computed in determining validity of abandonment, although a per cent. thereof is recoverable from cargo owner.

*Pegent vs. Ins. Co.*, 15 Wend. 453.

*Muggorth vs. Church*, 1 Caine's R., 215.

*Potter vs. Prov. Ins. Co.*, Fed. Cases, No. 11335.

*Watson vs. Ins. Co.*, 7 Johns. R. 57.

*P. & S. S. Co. vs. P. Ins. Co.*, 89 N. Y. 563.

*Int. U. Co. vs. Ins. Co.*, 100 Fed. 304.

2 *Phillips, Mar. Ins.*, Sec. 1545.

- (b) Items of expenditures found by Johnson & Higgins, but charged to owner as being particular average, or on account of vessel alone



(itemized statement attached).....\$ 1,554.78

Forward.....\$23,150.55

(c) Stores on board and lost:

Invoice cost ..... 2,370.14

(Cornfoot testified he estimated subsistence stores, chandlery stores, galley stores and slop-chest at \$1,500, and Page concedes these items. Thorndyke testified from actual invoices that these stores cost as follows:

Subsistence stores.....\$1070.39

Chandlery stores ..... 629.07

Galley stores ..... 313.98

Slop-chest ..... 356.70

\$2370.14)

Total loss, on adjustment as for partial loss, under clause 9.....\$25,520.69

Owner pays 15/45..... 8,506.89

Underwriter pays 30/45.....\$17,013.80

This exceeds fifty per cent of amount insured, and therefore makes a case of constructive total loss under clause 9 of the policy.

# "EXHIBIT A."

Items of expenditures allowed by Johnson & Higgins, but charged to owner as being particular average, or on account of vessel alone, to-wit:

(The references are to testimony of J. A. Bishop, Adjuster, and General Average Adjustment, Respondent's Ex. "4.")

Paid Frank Walker, for surveying vessel (proportion charged to vessel)....\$	600.00
(Apostles p. 533; Resp. Ex. "4," p. 11.)	
Paid Port of Portland.....	45.10
(Resp. Ex. "4," p. 17.)	
Berthing ship January 19 to February 8 (Vessel abandoned voyage Feb. 15)	40.00
(Apostles pp. 534-5; Resp. Ex. "4," p. 19.)	
Paid Vulcan Iron Works for repairs to Donkey Boiler.....	28.70
(Resp. Ex. "4," p. 19.)	
Expenses of H. R. Clise for trip to San Francisco on request of adjusters for conference relative to adjustment, Nov. 18th .....	38.00
(Apostles p. 510; Resp. Ex. "4," p. 25.)	
Thorndyke expenses trip to San Francisco on same conference.....	107.00
(Apostles p. 511; Resp. Ex. "4," p. 29.)	

Thorndyke, expenses to Portland to look after survey of vessel.....	23.60
(Apostles p. 511; Resp. Ex. "4," p. 31.)	
Thorndyke, expenses to Portland to receive tenders .....	34.20
(Apostles p. 512; Resp. Ex. "4," p. 31.)	
Master's expenses as agent in looking after vessel subsequent to separation of vessel and cargo on Feb. 15th, as follows:	
Moving and drying sails.....	25.20
(Resp. Ex. "4," p. 35.)	
Fares to confer with Walker, Sur- veyor .....	11.20
(Resp. Ex. "4," p. 35.)	
Hauling ship .....	1.60
(Resp. Ex. "4," p. 35.)	
Moving sails for examination of vessel..	9.60
(Resp. Ex. "4," p. 37.)	
Board of Master, Feb. 7 to April 12....	58.00
(Apostles p. 515; Resp. Ex. "4," p. 37.)	
Expenses of Master, trip from St. Johns to Portland.....	3.00
(Apostles p. 531; Resp. Ex. "4," p. 37.)	
Expenses of Master on trip from St. Johns to Seattle .....	6.85
(Resp. Ex. "4," p. 37.)	

Expenses of Master on trip from Seattle to Portland and return, May 3..	14.70
(Apostles p. 531; Resp. Ex. "4," p. 37.)	
Master's wages from Feb. 15 to April 12, at \$125 per month.....	250.00
(Apostles pp. 515-531; (Resp. Ex. "4," p. 36.)	
Paid telegrams and telephones.....	29.34
(Apostles p. 516; Resp. Ex. "4," p. 39.)	
Paid Port of Portland wharfage, Feb. 15 to May 31st.....	212.00
(Apostles p. 534; Resp. Ex. "4," p. 39.)	
Paid for telegrams.....	10.96
(Apostles p. 518; Resp. Ex. "4," p. 41.)	
Total.....	<hr/> \$1,554.78





2  
No. 2631

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY  
(a corporation),

*Appellant,*

VS.

THE GLOBE NAVIGATION COMPANY  
(a corporation), and S. P. WESTON, as  
trustee in bankruptcy of the GLOBE NAVIGATION  
COMPANY (a corporation), bankrupt,

*Appellees.*

## REPLY BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,  
IRA A. CAMPBELL,  
McCUTCHEN, OLNEY & WILLARD,  
BALLINGER, BATTLE, HULBERT & SHORTS,  
*Proctors for Appellant.*

*Filed this*.....*day of December, 1915.*

FRANK D. MONCKTON, *Clerk.*

*By*.....*Deputy Clerk.*



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## REPLY BRIEF FOR APPELLANT.

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In this reply, we shall briefly point out the many misstatements of fact in which appellees have indulged, and the manifest errors into which they have been led, touching the matters essential to a determination of the question of liability under the policies. It is worthy of note that they attempt no serious explanation of the admitted errors with which the District Court's opinion is so pregnant.

## I.

**THE "NOTTINGHAM'S" UNSEAWORTHINESS.****THE "NOTTINGHAM" WAS UNSEAWORTHY.**

Despite the ease with which appellees would gloss over the unseaworthy condition of the "*Nottingham*," the fact remains, as shown by the undisputed testimony of the master, that, *on leaving port, she was found to have fifteen inches of water in her; that on the second day it took the crew one hour out of every four to free her from water* (Ap. 261-2, 300-1); *that on putting her upon her starboard tack, she made more water rapidly, and in a short time it was impossible for the hand pumps to keep her free* (Ap. 303). On finding that he could not handle the increase of water with the hand pumps, although the men worked for four hours (Ap. 264-5), the master ordered the mate to start the steam pump, "and something happened to be wrong with the steam pump" (Ap. 265, 306). The steam pump was finally gotten into working order, sometime before they struck the heavy gale on the 8th (Ap. 268-9, 309). The vessel, however, had not been freed of water (Ap. 307-310).

No ingenuity of argument can alter the fact that prior to the gale of October 8th, *the "Nottingham" was in a badly leaking condition; that, indeed, she had half filled with water; that her hand pumps could not free her of water, and her steam pump was out of working order. At the time she was struck by the gale, she was still not free from water. If that condition of hull was not unseaworthiness, then the test of seaworthiness will require revamping! Such, on the ad-*

*mission of the vessel's master, was her condition during the first six days of her voyage from October 2nd to October 8th.*

Now, if the conditions of weather encountered during that period were not such as to account for the unseaworthiness, then it follows, as night the day, that such unseaworthiness must have existed on sailing. What was the weather experienced? *The character of weather to be expected on a voyage off the coast!* So stated the master (Ap. 306). It is thus established to a demonstration that the "Nottingham" was not in fit condition reasonably to meet the perils to be "expected" on the voyage.

By every test, therefore, she was unseaworthy.

Appellees cannot gainsay the established facts.

### **The Unseaworthiness Was Not Caused by the Westport Grounding.**

Appreciating the presumption of unseaworthiness which undeniably exists, and that no adequate cause therefor can be pointed to subsequent to the vessel's departure from Astoria, it is contended that her unseaworthiness was caused by her taking the mud at the mouth of Westport slough on her way down the river to Astoria. This suggestion of appellees, and their highly colored description of their now alleged strain (brief p. 25) finds no evidentiary support in the record, *but, on the contrary, the testimony of appellees' principal witnesses is contradictory of it.* It appears from the "secretive" telegram sent the master by appellee



on December 21, 1911, that *Walker*, appellees' surveyor, thought *that the top sides were responsible for the leak, although he later testified that the only way that he could account for the "Nottingham" having gotten water into her, was "through the hatches"* (Ap. 355-6). Similarly with the master. Upon receipt of the telegram directing careful search, he claims to have examined the vessel thoroughly all over, *but the only leak, save for a few soft places under the counter, found was that in the seam along the stern post* (Ap. 317-9).

It thus clearly appears that the contention of the unseaworthiness having been caused by the grounding in Westport Slough is not sustained by any evidence (Ap. 443-6). Such attempted explanation of the cause of the unseaworthiness, *while admitting the unseaworthiness*, is without probative value as to the cause.

### **The Steam Pump Was Unseaworthy.**

It is also naively contended that the fact of the steam pump not being in workable condition did not constitute unseaworthiness because, it is suggested, the "vessel was equipped with the usual hand pumps, which were sufficient to handle the water ordinarily taken in by the vessel in such storms as she usually encountered on her voyages." But her hand pumps were not adequate to take care of the water which she took in notwithstanding that, at the time the steam pump was needed, she had encountered no weather except such as was to be expected off the coast on the voyage. It is no answer to say that an unworkable steam pump did not render her unseaworthy because her hand pumps ought to

have been of sufficient capacity to do that which they failed to do. The steam pump was aboard the ship for a purpose; it was connected with the holds so as to remove any water which might gain access thereto; *it failed in its very purpose at the very moment when it was needed*, and thus left the vessel in a partially water-logged condition when the heavier storm of the 8th was encountered. Who can say that if the "Nottingham" had been freed of water, as she should have been, she would not have safely weathered the gale of the 8th and 9th? Certainly she was not in perfect condition in her partially water-logged state when the storm broke, and that unseaworthy condition was directly attributable not only to whatever cause admitted the water to the vessel, but to the failure of her pumps at the moment when they were put to the test.

With equal equanimity, it is said by appellees that the steam pump was in perfect condition. Such assertion is based alone upon the statement that when tried on the overboard suction the pump worked. But *the purpose for which the pump proved unseaworthy* was not in pumping water from the sea to wash down the ship, but *to free the vessel's bilges of water*. Yet, the master frankly admitted that *not only was the steam pump not tried on the bilges* either for Captain Crowe, when he surveyed the vessel before loading, or at all for Mr. Cherry (Lloyds' Agent, not surveyor), *but had not been used on the bilges, subsequent to the preceding voyage to Callao*, since when the "Nottingham" had been to Astoria, thence to Australia and back to Astoria.

Despite all that appellees may say, *such a record not only establishes that the pump was unseaworthy when needed, but shows a most lamentable want of due diligence in seeing that the pump was in proper condition for its designed use.* The bilge suction was as much a part of the pump as the plunger, and required even more careful attention, because it is admitted that it was liable to become clogged from debris which might find its way to the bilges (brief p. 28). Yet for many, many months it went untried. As was to be expected, it failed when put to the test! Who can but believe that if it had been in proper condition, the "Nottingham" would have weathered the storm? Certainly the record contains no evidence of the gale being so severe that any other vessel suffered by it. There is no hint that the schooner "David Evans", which was in the vicinity, even lost a rope yarn.

Appellees make no attempt to distinguish the application of *Benner Line v. Pendleton*, 217 Fed. 497, a case of unseaworthy pumps. The plain fact is that the "Nottingham" was unseaworthy as to her steam pump.

#### **Was The "Nottingham" Unstaunch?**

It is suggested that the unseaworthiness of the "Nottingham" is disproved by the testimony of the master as to the admission of the water through the quick work on the alleged shifting of the cargo. In the first place, not only does this not account for the constantly increasing leakage prior to the putting of the "Nottingham" upon the starboard tack, but even if true, it would, in itself, show an unseaworthy condition of the

vessel. It is not to be denied that a sailing vessel is required to sail upon different tacks. This necessitates the taking of a list, a condition which sailing vessels are built to withstand. Yet, here comes the master, long after making a report of the disaster silent upon the subject, and states that upon putting the "Nottingham" upon the starboard tack she lurched so that "the deckload shifted the least bit" (Ap. 262), and that subsequently he found water "pouring" into her half deck through the break of the poop, and that the galley forward was afloat with water coming in somewhere, through the shifting of the deckload (Ap. 263). No mention was made of this in his report to his owner explanatory of the disaster, nor is it consistent with subsequent developments.

In the first place, had such a shifting of cargo and opening of seams occurred, why would there have been all the "wonderment" as to the cause of the water entering? Appellee on December 21, 1911, telegraphed the master:

"Walker disagrees with Captain Crowe views about leak. *He thinks topsides responsible.* Wants you to make thorough examination of topsides look especially for rooms make no mention of what you learn over there. Please make examination Friday. Bring equipment list with you" (Ap. 317). (*Italics ours.*)

The master made the examination and the only seam he found in a leaky condition was the one along the stern post, and a few soft spots under the counter (Ap. 317-9). Walker, on the other hand, even as long after the disaster as September 3, 1913, testified that *the only*



*way that he could account for the water getting in the ship was through the hatches* (Ap. 355). Such evidence is not compatible with the statement of the master that the cause of the water entering the vessel was the opening of seams through the shifting of the deck cargo. If that had been the cause, is it unreasonable to believe that the telegram of December 21st would have been sent, or that Walker would have testified as he did, or that the master would have stated that no leaks were found, save those above mentioned? Such inconsistencies do not accord with the usual course of human conduct.

In the second place, if the cargo shifted under the stated conditions, and the side of the vessel was thereby sprung so as to admit the water, it demonstrated beyond the need of further proof the positive unseaworthiness of the vessel. The weather was such as to be expected on the voyage; the change in tack was part of the usual navigation of the sailing vessel. *If, then, the side sprung, manifestly it was not sufficiently strong or fastened to withstand the ordinary strains of the voyage.* That being true, the "Nottingham" was unseaworthy in that regard.

#### **Presumption of Unseaworthiness Not Overcome.**

The presumption of unseaworthiness arising from the "Nottingham's" springing aleak in weather reasonably to be expected (cases cited in opening brief, p. 12) has not been overcome by any showing of adequate cause, disconnected from the unseaworthiness and arising subsequent to the commencement of the voyage, for the



cause of the leakage apparently was the open condition of the stern post seam and the broken water-closet flange, both of which, for all the evidence discloses to the contrary, existed on sailing. Certainly, even the master found the open stern post seam during his examination following the telegram of December 21 (Ap. 317).

The unseaworthiness of the steam pump is clear: that of the hull, due to unstaunchness, is manifest, if it were a fact that the listing of the vessel and a slight shifting of deck cargo sprung her side, and thereby opened her seams. The refusal of Walker, appellees' surveyor, to accept this explanation of the entrance of water into the vessel (Ap. 355), justifies a skepticism as to the master's afterthought. But if it were true, then unseaworthiness is established.

### **The Surveys**

It is true that Captain Crowe issued a certificate of seaworthiness prior to her loading, but he did not thereafter survey the "Nottingham." It may be that Mr. Cherry examined her at Astoria, but Mr. Cherry was not the agent of appellant, and was not, as appellees state, Lloyds' surveyor. As the record shows, he was Lloyds' agent at Astoria, an entirely different capacity than that of surveyor. But, whatever may have been his opinion as to the vessel, it cannot estop appellant from questioning the manifest unseaworthiness.

### **The Alleged Waiver of Unseaworthiness**

It is said by appellees that they were induced and instigated to incur the general average expenses set forth in the general average statement prepared by their adjusters, John & Higgins (brief pp. 13, 14, 18). Such assertion is not true. Nor is there evidence to support it. The record, on the contrary shows that appellant denied liability for total loss from the beginning, and has never to this day receded from that position. The general average expenditures were made by appellees of their own volition in caring for ship and cargo, many of them being incurred in removing the vessel to the St. Johns' drydock for the express purpose of determining whether or not there was a loss under the policies (Ap. 370-1). True, it was done without prejudice to the rights of either party, but it is not in consonance with the facts to say that the expenditures were "instigated" or "induced" by appellant. They were not, and appellees have not been misled as now claimed.

It is said that the defense of unseaworthiness has been waived by delay, and yet appellant gave notice during the trial that the defense would be made if the evidence adduced merited it (Ap. 394-5). Following the taking of proof, unseaworthiness was pleaded in conformity with the evidence, and no objection to appellant's right to do so was interposed by appellees.

If, therefore, the evidence establishes unseaworthiness, or fails to overcome the presumption thereof, as we have shown that it does, the policies were voided.

*Pope et al. v. Swiss Lloyd Ins. Co.*, 4 Fed. 153  
(Judge Hoffman).

It is suggested that rescission required a return of premium. That would be true where the premium had not been earned, but here the premium had been earned by the attachment of the time policies on the 20th day of April, 1911. The fact that the policies were subsequently voided by breach of warranty did not make any part of the premium returnable. Being one entire premium for a specified term, it was fully earned once the risk commenced.

*Arnould on Marine Ins.*, 8th Ed., Sec. 1251.

It is also contended that *Victoria S. S. Co. v. Western Assur. Co.*, 139 Pac. 807, establishes a rule by which a breach of warranty will not be held to void a policy unless there is an express rescission. Such construction not only goes beyond the plain meaning of the opinion,—for the case had alone to do with an immaterial warranty,—but is contrary to the express holding of this court.

In

*Canton Ins. Office Ltd. v. Independent Trans. Co.*,  
217 Fed. 216,

this court, construing a policy substantially in the form of the policies in suit (San Francisco Hull Time Policies), held that a breach of warranty voided the policy. Express rescission was not required. To the same effect was Judge Hoffman's decision in

*Pope et al. v. Swiss etc.*, *supra*.

We respectfully submit, therefore, that the evidence clearly establishes that the "Nottingham" was unseaworthy and that the policies were thereby voided.

## II.

**CONSTRUCTION OF POLICY.****CLAUSE 9, NOT CLAUSE 3, DEFINES RIGHT OF ABANDONMENT.**

It is contended by appellees that the words "and the provisions of the Civil Code of California," as used in the following clause of the policies:

"Touching the adventures and perils which this Insurance Company is contented to bear, and takes upon itself in this Policy, they are of the Seas, Fires, Pirates, Assailing Thieves, Jettisons, Barratry of the Mariners (but not of the Master)  
 \* \* \* *and all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which insurers are liable by the Rules and Customs of Insurance in San Francisco, including the Rules for Adjustment of losses printed on back hereof and the provisions of the Civil Code of California, excepting such losses and misfortunes as are excluded by this Policy*" (italics ours),

have the effect of imposing upon appellant a liability for constructive total loss, as such liability is fixed by the provisions of the Civil Code of California, to wit, sections 2705 and 2717. Such construction of the clause assumes, in the first place, that notwithstanding no mention is made in the clause of the degree of loss intended to be covered, i. e., whether actual or constructive total loss, such was its intent, despite the fact that the words are but limitations upon the preceding words "and all other losses and misfortunes that shall come to the hurt or damage of the vessel, or any part thereof", which follow the preceding specific enumeration of various causes of loss, as seas, fires, pirates, etc. In other words, after naming specifically the adventures

and perils which appellant was contented to bear, and take upon itself, as of the seas, fires, pirates, etc., the clause contained the general provision "and all other losses and misfortunes, etc." Now, the word *other* referred back, on the *ejusdem generis* principle, to the preceding character of losses and misfortunes so as to indicate that those which were to follow were of similar category to those just enumerated. When, then, it is said that the words "and the provisions of the Civil Code of California", modifying or defining the other losses and misfortunes that should come to the hurt or damage of the vessel insured, or any part thereof, were not used in the sense of adding to the kinds of losses previously enumerated, but referred to a degree of loss, irrespective of kind or cause, such interpretation does violation to every principle of construction. On appellees' theory, but for such clause, the policies would not have covered a constructive total loss, and yet it is elementary that every policy of insurance so insures, unless express exception thereof is made. No exception of that character was made in the policies in suit, but they did except partial loss by virtue of a red ink deletion in another clause. And as though no claim had just been made that the liability for constructive total loss was created by clause 3, appellees, on page 32 of their brief, suddenly assert that the first clause expressly covers actual and constructive total loss.

But, in even more marked degree is the construction which appellees would give to the policies unsound, for the certain effect of saying that the words



“and all other losses and misfortunes that shall come to the hurt or damage of the vessel hereby insured, or any part thereof, to which insurers are liable by \* \* \* the provisions of the Civil Code of California, \* \* \* ,”

made appellant liable for a constructive total loss, as it is defined by sections 2705 and 2717, would be to hold that clause 9 of the policies was nullified by the provisions in question. Little wonder, then, that appellees were led to the confession: “It seems to us that there is a conflict between the two” (clauses 3 and 9). The construction which they would place upon clause 3, in the vain endeavor to obtain the advantage of sections 2705 and 2717 of the Civil Code, inevitably drove them to such conclusion. Such conflict would exist because section 2717 provides that a person insured by a contract of marine insurance *may abandon* the thing insured \* \* \* and recover a total loss thereof, when the cause of the loss is a peril insured against:

1. “If more than half thereof in value is actually lost, or would have to be expended to recover it from the peril:

2. “If it is injured to such an extent as to reduce its value more than one half, etc.,”

whereas clause 9 provides

“that the insured shall not have the right to abandon the vessel unless the amount which this company would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured”.

Both section 2717 and clause 9 of the policies prescribe the conditions under which abandonment could

be made, but the conditions are so utterly dissimilar, so irreconcilably in conflict, that effect could not be given both. If both were carried into the policies, one would have to fail.

In such circumstances, it surely cannot be seriously contended that, although clause 3 makes no reference to sections 2705 and 2717 of the Civil Code, it impliedly embodies them in the policies, and that thereby clause 9, and, of necessity, clause 8, are to be nullified! If that were the intent of the policies, clause 9 would never have been inserted in the policies. It was placed there to perform a function, not as a dead letter; and the only effect that can be given it is that of prescribing the conditions under which an abandonment for constructive total loss could be made. This court will not read clause 9 out of the policy on such a fallacious contention.

In fact, the whole history of the development of clauses similar to 9, defining the conditions under which abandonment can be made, shows that it was drawn for the express purpose of getting away from the effect of the general American maritime law, of which section 2717 is but a codification (see the history of the clause as recorded in the cases cited on page 37 of appellant's opening brief). To say, then, that while the object of the insertion of clause 9 was to change the rule of abandonment, as prescribed by the general American maritime law, of which section 2717 is a codification, yet the express incorporation of clause 9 in the body of the policies did not accomplish its intended purpose, would, indeed, be an inconsistency.

It is said by appellees on page 36 of their brief that "so far as is shown in the reported cases, none of the cases cited by appellant on page 37 of its brief contained any clause in the policy itself referring to a statute as defining the extent and nature of the liability for the losses covered by the policy". Why, if appellees had but read with a semblance of care the case of

*Soelberg v. Western Assur. Co.*, 119 Fed. 23, a decision of this court, they would have immediately ascertained not only that the policy there under consideration was identical with those in suit, so far as clauses 3, 8 and 9 were concerned (see pages 26 and 27), but that this court expressly referred to clause 9, and upheld the validity of the policy. Judge Hawley said:

"In order to entitle the plaintiffs to recover it is essential for them, by competent proof, to show a loss which comes within the terms of their policy of insurance. *They must bring their case within the provisions of the contract of insurance. They are bound by the lawful agreements and stipulations therein contained, and must satisfactorily prove a loss. The burden is, of course, upon them to establish their right to recover.* \* \* \*

"We are of the opinion that these authorities sustain the proposition that *the evidence in this case, which consists of mere proof that the cost of repair would exceed the value of the ship when repaired, does not, under the provisions of the policy, prove either an actual total loss or a constructive total loss, and does not prove a partial loss.* \* \* \*

"The policy in the present case provides 'that the insured shall not have the right to abandon the

vessel, unless the amount which this company would be liable to pay under an adjustment, as a partial loss, \* \* \* shall exceed half the amount hereby insured.' \* \* \*

“But it is unnecessary to decide in the present case whether the amount of the insurance of \$15,000 in the one case, or \$5,000 in the other, or \$75,000, the value of the ship mentioned in the policy, constitute the basis of the computation, because no evidence appears in the record to give any basis whatever for the determination of the percentage of damage. *The only evidence in this regard is confined solely to the proposition, heretofore stated, that the vessel when repaired would not be worth the cost of repairs which is, as we have heretofore attempted to show, wholly insufficient.* There must be some testimony upon which a jury could act in fixing the amount of damages. There being none, the court did not err in directing the jury to find a verdict for defendants.”

The very fact that appellees have studiously avoided making any reference, save its bare mention once on page 98 of the brief, to the above decision of this court, upon the very form of policy here in suit and decisive of many, if not all, of the determining questions here involved, shows how impossible they have found it to get away from the effect of the decision upon the vital issues. *By their silence upon the case, they confess their inability to distinguish it from the one at bar.* And upon the validity of clause 9 in the policy, it is particularly decisive.

**Clause 9, Not Marginal Clause, Defines Right of Abandonment.**

The fallacy of the contention that by the use of the word “including,” in the marginal clause, general aver-



age and salvage charges were to be added to the cost of labor and materials used in the repairs, instead of being excluded, as provided by clause 9, is self evident even to appellees, because such construction, as we have pointed out in our opening brief, would equally justify and necessitate the adding to the cost of repairs of claims under the three-fourths running down clause. Appellees say that "it is not usual to include those claims in determining constructive total loss." Not usual! Why, we challenged appellees to cite *one* case to this court (opening brief p. 35) in which it had been done! And they have failed to produce the authority. Not usual! *It never has been done so far as any recorded decision shows, or within the knowledge of the most experienced adjusters on the Pacific Coast* (Ap. 489, 498-9, 502). The very suggestion does violence to every basic principle of constructive total loss. Constructive total loss has to do with injury to the insured vessel and the cost of repairing the same; not with injuries inflicted upon other vessels. And yet, if the construction contended for by appellees was given the marginal clause, claims under the three-fourths running down clause could most certainly be added to the costs of repairs, to make a constructive total loss. Such construction is untenable.

Clause 9 has to do with the conditions under which an abandonment for constructive total loss can be made. On the other hand, no reference is made in the marginal clause to the conditions of abandonment: *that clause alone states what the insurance is against*. The right



to abandon, therefore, is, by every reasonable intentment of the policies, determined by clause 9.

It is charged that because the valuation of \$45,000 was stated in the policies, it would be a fraud to enforce the provisions of clause 9. There is in the record no evidence of fraud in making the valuation, or in writing the policies. But, on the contrary, such valuation is conclusive between the parties in the adjustment of a total loss.

Section 2736 of the California Civil Code so provides:

“A valuation on a policy of marine insurance is conclusive between the parties thereto in the adjustment of either a partial or total loss, if the *insured* has some interest at risk, and there is no fraud on *his* part; \* \* \* *But a valuation fraudulent in fact entitles the insurer to rescind the contract.*” (Italics ours.)

The fact that the code makes the valuation conclusive unless there is fraud on the part of the *insured*, and then gives the *insurer* the right to rescind if there be fraud, is not consonant with the suggestion that, in the case at bar, appellant was chargeable with a fraudulent valuation of appellees' own vessel.

This court, in

*Standard Marine Ins. Co. v. Nome Beach L. & T. Co.*, 133 Fed. 636, 646,

held:

“The valuation fixed in the policy is conclusive between the parties.”

*Arnould on Marine Insurance*, 8th Ed. Sec. 341;  
*The Potomac v. Cannon*, 105 U. S. 630; 26 L. Ed. 1194.

With the valuation conclusive between the parties, the fact that it may have been fixed at \$45,000 constitutes no valid reason for refusing to enforce the provisions of clause 9. If it does, then the valuation would always be open to inquiry, for, otherwise, it would be impossible to determine whether clause 9 was to be enforced in accordance with its terms.

It is further said in support of the contention that, assuming the "Nottingham" to have been worth \$30,000, she could not possibly have sustained a damage of \$33,750, and that a constructive total loss under clause 9 was impossible. Of course, there is no proof in the record to support such contention, for it could not be true. And that repairs to a vessel actually worth \$30,000 might well cost \$33,750, finds recognition in the fact that so long has it been accepted that repairs to an old vessel materially better her and increase her value, that there has grown up in the law of marine insurance the arbitrary deduction of one-third from the cost of repairs to allow for the difference in value arising from the substitution of new material for old. It might well be, then, that repairs to the "Nottingham", valued, because of age and condition, at, say, \$30,000, would cost \$33,750, and her value when repaired thereby increased, because of the betterments, greatly above the \$30,000. For instance, how can it be reasonably urged that the "Nottingham", with her new caulking, new painting, new masts, new rigging, new sails and new equipment would not have been worth more when repaired than before the accident? To say that she would not, would be tantamount to holding that the

vessel could be built anew for her value as decreased by old age,—an absurdity in its very suggestion.

Nor is it correct to say that under all conditions the cost of repairs would have to amount to \$33,750 to make a constructive total loss. That would be true if a deduction of one-third was to be made from the cost of all repairs. But if, perchance, damage were done to the ship's bottom immediately after she had been caulked and painted, as might well occur by a heavy grounding, then no deductions would be made from the cost of bottom painting and caulking (clause 8). It would not, therefore, in those circumstances, require a cost of repair of \$33,750 to make a constructive total loss under clause 9.

Then, again, while it is true that Thorndyke testified that the vessel was worth only \$30,000, that valuation was subject to market fluctuations, depending upon the condition of the freight market. Because, therefore, Thorndyke may have thought her worth \$30,000 at the time of the accident, that was no assurance that her value would remain at that figure throughout the term of the policies.

The foregoing but too clearly illustrates the utter fallacy of the contention to which appellees have resorted in their efforts to evade the effects of clause 9 of the policies, fixing the conditions under which an abandonment, as for a constructive total loss, can be made. *The truth is, as appellees well know, that there was nothing fraudulent in the valuation, and that the marginal clause was not inserted to overrule the pro-*

*visions of clause 9.* That they had no such belief, and did not refuse to accept the policies without the marginal clause, and did not, for that reason, insist upon the marginal clause, as they would hope this court would infer, but which they do not squarely so state (brief pp. 41-2), is proved to a demonstration by their advancement of the different theories of construction by which they have made great effort to annihilate clause 9. If they had accepted the policies on any understanding that the marginal clause provided for a constructive total loss, as known in general marine insurance (as they state on page 42 of their brief), they would not have resorted to the contention that liability for constructive total loss was fixed by the provisions of the California Civil Code (sections 2705 and 2717), through clause 3 of the policies, or to the assertion that the effect of the marginal clause was to cause general average and salvage charges to be added to the cost of repairs, as determined by clauses 9 and 8. The different positions taken are too inconsistent to imprint the stamp of sincerity upon the cry of fraud which they have raised.

The fact is, as we pointed out in our opening brief, that the marginal clause is but definitive in character. Upon no other theory can it be given a construction which balances with the enforcement of all of the other clauses of the policies. So construed, however, it is consistent with body provisions, and should, we most respectfully submit, be enforced accordingly. In so holding, all of the clause of the policy will be made effective. The result is that appellees' right to abandon

is to be determined by the conditions of clauses 9 and 8, and the rules for adjustment on the back of the policies.

*Soelberg v. Western Assur. Co., supra.*

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### III.

#### **THERE WAS NOT A CONSTRUCTIVE TOTAL LOSS COMPUTED ACCORDING TO CLAUSES 8 AND 9 OF THE POLICY.**

Under this head, we shall reply to part V of appellees' brief.

Appellees open their discussion of the question as to whether the evidence shows a right of abandonment under clause 9 by remarking that Mr. Wilfred Page has made a *sample* adjustment of this loss. It is more than a *sample*; it is an actual adjustment of the cost for which the "Nottingham" could have been fully repaired, and is made, by the admission of appellees' adjuster, Mr. Bishop, strictly in accordance with the principles and rules applicable thereto (see appellant's opening brief pp. 62-69). The result shows that if the "Nottingham" had been fully repaired, the amount which appellant would have been liable to pay under an adjustment as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) would have amounted to \$9,540.66.

Appellees contend that the adjustment was incorrect, and would add thereto many items, which, they say, were improperly omitted. Let us examine the extra items, for it will at once be clear that they are not properly to be included.



The first amount which appellees would add is the sum of \$3,180, taken from the Hall Bros. estimate (Exhibit "K"). The entire estimate was \$5,245, but from it appellees admit deductions amounting to \$2,065 should be made, leaving the \$3,180. The admitted deductions totalling \$2,065 are: \$755, for removing wash strake and caulking back of stanchions, the proper cost of which is already included in the Page adjustment; \$575, for resalting vessel, instead of which \$600 has been included in the Page adjustment; \$80, difference in painting allowed by the Walker-Gibbs' agreement; and \$655, designated by appellees as certain other deductions contained in the Walker-Gibbs' agreement, the items of which appellees do not specify. The \$655 includes all of the Walker-Gibbs deductions. Now, then, *the pertinent inquiry is, what are the remaining items of the Hall Bros. estimate, totalling \$3,180, which appellees would add, and are they properly chargeable to the cost of repair?*

1. The first item is \$1,000 for caulking all of main deck and waterways, including space underneath fore-castle deck, but not abaft of bulkhead forward end of cabin; on face and sides of bulwarks stanchions; and pitch all seams and butts. Indisputably, that amount cannot be added to the cost of repairs because, in the first place, it includes work already covered by the original specifications, the cost of doing which was included in the Albina bid upon which the Page adjustment is largely based.

If the court will but refer to the original specifications (Exhibit "F", Cornfoot Exhibit 1, Ap. pp. 91, 98), it

will ascertain that they call for caulking of the feet of all bulwark stanchions; decks around hatches, together with one seam on each side of the same for the full length of the vessel; four seams along the waterways on each side for the full length of the vessel, carrying the same under the forecastlehead; alleyways under forecastlehead to be caulked on each side; forecastlehead deck to be searched for leaks, caulked and made tight; 500 feet of caulking on the poop; and all seams to be paved with pitch and puttied. With the Albina bid including the foregoing deck caulking, the \$1,000 items of the Hall Bros. estimate cannot be added to the Page adjustment *without thereby charging twice for the deck caulking covered by the specifications.*

In the second place, the \$1,000 includes the caulking of *all* of the main deck. The contention that this should have been done is alone based upon the Walker supplemental report, full consideration as to the fairness of which was given in appellant's opening brief pp. 51-5. As we said therein, Walker certainly went over the entire main deck and under the forecastlehead deck before preparing the specifications. In fact, he could not have prepared the specifications without doing so. That he could not have overlooked the deck seams, the caulking of which was not included in the specifications, but included in the supplemental report, is convincingly demonstrated by a single glance at the photograph (Exhibit 2). Walker could not have specified the deck caulking which he did in the original specifications, without having observed the remainder of the deck seams. Having so carefully covered the deck caulking

in the original specifications, and yet not having provided for caulking all of the deck seams, his supplemental report cannot be justified, because if he did not at the time of the preparation of the original specifications note the condition of all of the main deck seams, he could not have known it at the time of making his supplemental report, for, in the interim, he had not been aboard the "Nottingham" (Ap. p. 198). That Walker did not think that the deck needed caulking *all over* at the time he was preparing the specifications is shown by the telegram sent by Thorndyke to the master (Ap. p. 317) in which the master was informed that *Walker thought that the top sides were responsible for the leak*. Thorndyke and Walker manifestly considered, when they sent out the original specifications, that the caulking of the deck seams therein required would make the "Nottingham" seaworthy, for the specifications expressly stated an intent to briefly describe the *work necessary to place the vessel in the same good condition as before the accident*. For that reason, the contractor was to be called upon to observe not only the letter but the spirit of the agreement. Furthermore, that the entire deck did not need caulking was established by the testimony of Mr. Nelson, an independent surveyor employed by the Port of Portland, who testified that *the decks were very good*, all except probably a little loose along the waterways (Ap. p. 444).

On no ground, therefore, can the addition of the item of \$1,000 to the cost of repairs included in the Page adjustment, be justified.

2. The second item of the Hall Bros. estimate is \$2,020, for caulking the entire hull from keel to bulwarks; caulking bulwarks, abreast of forecastle and poop decks, including painting and cementing of seams as necessary. Appellees insist that this amount should be included in the cost of repairs, and yet during the course of the trial, they **stipulated that the bottom of the vessel, from the third seam below the light load line down, did not require caulking, except as provided in the original specifications** (Ap. pp. 348-9). Manifestly, appellees err when they insist that the cost thereof, as estimated by Hall Bros., should be included. Why they so demand in face of the *stipulation* passes understanding, for the same error was made in their brief below, and was there specifically called to their attention. *The stipulation eliminates the cost of bottom caulking from further consideration.*

This leaves the caulking of the topsides, for they include all portions above the light load line. The aforesaid stipulation as to bottom caulking was without prejudice to the question of the topsides. *The evidence clearly shows that the topsides did not need caulking other than that provided for by the original specifications*, as follows: "Garboard seams on both sides, hood ends of planking and all butts of bottom and topsides to be thoroughly caulked, seams painted and cemented. Before ship is again placed in water, entire planking of hull to be searched for leaks with hose on inside" (Exhibit F, Ap. p. 102). Mr. Mackintosh testified that if a leak developed in the hull, the caulking of it would have been done by him under the bid (Ap. p. 86).



Furthermore, the original specifications covered the repair to the outside of the forecastlehead and poop, as follows:

“The quick work on the port side to be refastened.  
 \* \* \* Forecastlehead deck to be searched for leaks, caulked where necessary and made tight, including quick work and superstructure on each side. \* \* \*  
 Overhang of poop to be renewed right across \* \* \*  
 Three strakes of quick work and covering board on port side of poop to be renewed back to original scarphs. The whole to be caulked and made tight”  
 (Exhibit “F”, Ap. pp. 95, 98, 99).

This work covered that of the topsides included in the second item of the Hall Bros. estimate. Did appellees so state to the court when asking for the addition of the \$2020 as part of the \$3180? No! Yet it cannot be denied that it is a duplication of work on the topsides. Why, then, if this court is to have this case fairly presented for its determination was not the duplication called to its attention?

Not only was the work called for by the second item of the Hall Bros. estimate thus covered by the specifications and the stipulation, but the record shows that there were no leaks in the topsides, except the hood ends, and only a few soft spots under the counter. *This appears from the master's statements.* Acting on the aforementioned telegram of December 21st, the master, with his mate, examined the vessel thoroughly all over, swinging stages on both sides, and examining particularly the butts and seams of the whole topsides. The only seam found in a leaky condition was that along the stern post, and a few soft spots under the counter. Except for



these, the seams were in as good condition as when the vessel went to sea. The master could see no difference (Ap. pp. 317-9). Mr. Nelson also found the outside caulking to be in very good condition (Ap. p. 444). The caulking of the hood ends was covered by the original specifications, as follows:

“Hull repairs \* \* \* hood ends of planking and all butts of bottom and topsides to be thoroughly caulked, seams painted and cemented” (Exhibit “F”, Ap. p. 102).

In these circumstances, we submit that all of the work required to be done to place the bottom and topsides in sound condition (Hall Bros. item 2) was included in the original specifications. That the work required was not extensive, is shown by the *stipulation* that the bottom caulking was not necessary, and by the testimony of the master as to the topsides. There was not, then, any justification for Walker stating in his supplemental report “calk entire hull up to bulwarks, cement and paint seams as before” (Exhibit “J”). Bearing in mind that Walker had not inspected the “Nottingham” since his survey in December, it was not surprising that counsel *stipulated* that at least a large part of this requirement, advanced for the first time in March, was unnecessary. Being unnecessary as counsel admitted, why did Walker include it in his supplemental report, if he were really making up a specification of *work required to repair damages resulting from the accident*? It is inexplicable.

In this connection it is interesting to note that on March 27th, no mention of this work was made in the

Gibbs-Walker agreement. There is, then, no excuse or reason for appellees now asking this court to add the \$2020 of the Hall Bros. estimate to the Page adjustment.

3. The third item of the Hall Bros. estimate, which appellees would seemingly add, is \$540, for removing shoe the entire length, installing new shoe, covering bottom of keel with felt and composition sheathing, and fastening shoe with composition spikes (Exhibit "K"). This was also included in Walker's supplemental report, as repairs which were considered as absolutely necessary (Exhibit "J"). But, again, *appellees stipulated that it was not necessary to remove any portion of the shoe, except that provided in the original specifications* (Ap. p. 349). Again, being mindful that Walker did not provide for the removal of the entire keel in his original specifications, but without thereafter seeing the vessel, included such requirement in his supplemental survey *as absolutely necessary*, and that subsequently counsel *stipulated* that repairs needed were as stated in the specifications, and not in the supplemental report, the record, at the least, casts a "shadow of doubt" upon the "reliability" of Walker's supplemental report. One thing is certain, and that is that *the stipulation eliminates any right to have that item of the Hall Bros. estimate added to the Page adjustment.*

4. The fourth item of the Hall Bros. estimate is \$20 for removing, etc., iron in wake of anchors. This was not included in the original specifications, *but comes in through Walker's supplemental report* (Exhibit "J"), and yet the specifications were drawn to place the vessel in the same condition as before the accident. If

credence is to be given the expressed intent of the specifications, this item cannot be added to the Page adjustment. But if there be doubt, it should be added.

5. The fifth item of the Hall Bros. estimate is \$65, for removing, replacing and recaulking cargo ports. This was required by the Walker supplemental report, but not by the specifications. They are part of the topsides and overhang of the poop, and were covered by the specifications under the heading of repairs thereto. Likewise, they were included in the master's inspection, and were not found to be unsound or leaky. Unless the mere fact of their being in the Walker report, is an all-sufficient reason for their being added to the Page adjustment, which we very much doubt in view of the discredit cast upon it by the circumstance of its making, and particularly by counsel's stipulation as to its most important requirements, the item should be excluded. But again, if there be doubt, it should be added.

6. The sixth item of the Hall Bros. estimate is \$755, for removing wash strake. This has been deducted by appellees as part of the \$2,065, for the correct amount was \$277.50, already included in the Page adjustment.

7. The seventh item of the Hall Bros. estimate is \$225, for a new foreyard. This is also called for by the Walker report, although its condition must have been known to Walker when he prepared the original specifications. This is evidenced by the fact that Walker carefully included in the specifications repairs to the masts and booms. No mention of it is made in the Walker-Gibbs' agreement (Exhibit 5a). And note in Walker's report that the damage to the yard was that

it was sprung. In all of these circumstances, it would seem that proper foundation had not been laid to require that it be added to the Page adjustment. But add it, if doubtful.

8. The eighth item of the Hall Bros. estimate is \$45, for new battens on foremast, called for by the Walker report. It was not mentioned in the specifications or the Walker-Gibbs agreement (Exhibit 5a). The same reason for disallowance applies as to all of the foregoing items for the first time mentioned in the Walker report.

9. The ninth, and last, item of the Hall Bros. estimate is \$575, for salting. This has already been deducted by appellees, as \$600 for the same thing has been included in the Page adjustment.

Summarizing the Hall Bros. estimate, it is certain that items 1, 2, 3, 6, and 9 cannot, under any circumstances, be required to be added to the Page adjustment. If doubtful, items 4 for \$20, 5 for \$65, 7 for \$225 and 8 for \$45, or a total of \$355 shall be added.

Now in addition to the foregoing, appellees insist that because the "Nottingham" was in a foreign port (Portland), her home port being Seattle, they are entitled to include in the cost of repair, the wages, not of the manager, but of an expert marine surveyor. This, notwithstanding the fact that the manager felt fully competent to testify regarding the damages and repairs. But for sake of argument, allow the demand, which appellees fix at \$975.

This makes a total of \$1330 (\$355 and \$975=\$1330) to be added to the \$18,913.65 of the particular average



$\frac{1}{3}$  off column of the Page adjustment, or total of \$20,243.65. From this  $\frac{1}{3}$ , or \$6747.88, is to be deducted, leaving \$13,495.77. To this is to be added, as has already been done in the adjustment, \$1500 for consumable stores, and \$201.89, vessel's proportion of bottom painting, making a total of \$15,197.66. *Inasmuch as appellees insured but \$30,000 on the "Nottingham", valued at \$45,000, the amount which appellant would be liable to pay under the adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of repairs) would be  $30,000/45,000$ ths, or  $\frac{2}{3}$  of the aforesaid \$15,197.66, or \$10,131.77. As this would not equal, let alone exceed, half the amount insured by appellant ( $\frac{1}{2} \times \$30,000 = \$15,000$ ), appellees did not have the right, under clause 9, to abandon as for a constructive total loss. In fact, even allowing for everything that could possibly be claimed under the Walker supplemental report and the Hall Bros. estimate thereon, the Walker-Gibbs' agreement, and the original specifications, the amount which appellant would be liable to pay under an adjustment as of partial loss for labor and materials (exclusive of salvage and general average expenses and the cost of funds) would fall \$4868.23 ( $\$15,000 - \$10,131.77 = \$4868.23$ ) below the amount required to make possible an abandonment for constructive total loss.*

Appellees reach a different result, showing that the amount which appellant would be liable to pay under an adjustment as of partial total loss, as \$17,170.61 (appellees' brief p. 81). The difference in their calculation and appellant's lies in this: they add (A) \$3180



from the Hall Bros. estimate (instead of appellant's \$355); (B) \$975 for supervision (the same as appellant); (C) \$2370.14 for stores, instead of the \$1500 for which Mr. Cornfoot offered to furnish them; (D) \$5780, being *all of the general average* as stated by their adjusters, Johnson & Higgins, less the salvage of \$3,000 paid the Port of Portland; and (E) \$1554.78 taken out of the items of the general average statement, which were charged to the owners and not to general average, by Johnson & Higgins. All of these sums added to the Page adjustment, with  $\frac{1}{3}$  deducted, gave a net total of \$25,755.01, of which 30/45ths amounted to the \$17,170.61. This is the amount which appellees say appellant would have been liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage and general average *expenses* and the cost of funds). The error of appellees, the inconsistencies and unsoundness of such adjustment are so clear and certain that they are easily exposed.

(A) In further consideration of appellees' proposed additions to the Page adjustment, we will again refer briefly to the Hall Bros. estimate from which appellees insist \$3180 should be added. We have already pointed out that none of the items, save as a matter of doubt possibly items 4, 5, 7 and 8, totalling \$355 can be added to the Page adjustment. Yet, appellees say that \$3180 should be added. (On page 81 of appellees' brief this amount which they say should be added is stated as \$3885, whereas on page 78 it is given as \$3180.) This is based upon Walker's supplemental report, which they say should be accepted because "Walker's statement that

these repairs were rendered necessary by the disaster and were essential to restore the vessel to a good seaworthy condition, stands absolutely uncontradicted, and establishes that fact in the case" (brief p. 84). That is a daring, as well as rash, statement, for it is out of accord with the facts! That all of the work covered by Walker's supplemental report was not necessary to restore the vessel to a good seaworthy condition, was indisputably established by *counsel's stipulation* that two of the largest specifications, bottom caulking and removal of shoe from keel for full length, were not necessary. The stipulation reads:

"It is hereby stipulated by and between the proc-tors for the respective parties hereto, that *the following work was not necessary to restore the schooner 'Nottingham' to the same condition that she was in prior to the disaster which she met after leaving the port of Astoria on October 20, 1911.*

1. "*It was not necessary to cork the bottom from the third plank below the light load line down, except as provided in the original specifications.*  
\* \* \*

2. "*That it was not necessary to remove any portion of the shoe, except that provided in the original specifications.* \* \* \* " (Ap. 348-9.)

The broad and reckless statement of appellees cannot be reconciled with that *stipulation, which eliminated* from the Walker report, and thereby from the Hall Bros. estimate *two of its most important and costly items.*

Again, Walker, himself, admitted that Captain Crowe would not agree with his views, and after the disagreement the telegram of December 21st (Ap. p. 317) was sent asking for a secret survey by the master. As we

have seen, the master said that he thoroughly examined the vessel all over, and the only seam that he found in a leaky condition was the one at the stern post, and a few soft places under the counter (Ap. pp. 317-9). All of the other seams were in practically as good condition as when the vessel sailed (Ap. p. 319). Now, if that was not contradictory of Walker's report that the entire hull needed caulking, the word is meaningless.

Still further contradiction is found in the testimony of Mr. Nelson, a disinterested witness and an experienced shipbuilder, who examined the "Nottingham" for the Port of Portland, and found her deck and outside planking and seams in good condition (Ap. pp. 443-6).

Bearing in mind that the Walker agreement was supplemental of the original specifications drawn by him, it is clear that, with the elimination by *stipulation* of the bottom caulking and removal of shoe, except as provided by the original specifications, with the doubt cast upon his requiring, in March, the entire deck to be caulked, as contrasted with that provided by the specifications, with the remaining deck caulking, topsides and shoe removal duplications of work required by the specifications, and with the specifications expressly stating an "intention" to describe the repairs *necessary to place the vessel in the same condition as before the accident*, no reason exists which would justify the addition of \$3180, or \$3885, as it may be, from the Hall Bros. estimate, save, perhaps, as to items 4, 5, 7 and 8, totalling \$355.

And finally it is urged that, despite the foregoing facts, the Hall Bros. estimate on the work required by

Walker's supplemental report, should be added because Captain Gibbs did not testify that the work thereby required was not needed to restore the vessel to a seaworthy condition. Of course, he did not testify. Why? *He did not see the "Nottingham" until May, 1912, seven months after the disaster.* Even then, he did not see her on drydock. He could not, therefore, have had personal knowledge as to the condition of her deck seams, and side seams, bottom, keel, etc., immediately after the accident. When he saw the vessel in May, the seams had been exposed, uncared for during seven months, and could not have been, and were not in as good condition as in October or November. There was every reason, then, for his not being interrogated upon something of which he had no personal knowledge. But that constitutes no sufficient reason for now saying that his failure to testify justifies the acceptance of the Walker report and the addition of its items, as estimated by Hall Bros., to the Page adjustment. The very suggestion demonstrates the extreme to which appellees are driven to increase the cost of repairs.

(B) The addition of \$975 for expenses of supervision has already been fully considered and granted, if there be any doubt as to the propriety of the charge.

(C) Appellees insist that \$2370.14, as testified to by Mr. Thorndyke, should be added for cost of stores, instead of the \$1500 allowed by Mr. Cornfoot.

The list of stores was attached to the specifications and was therefore covered by the bid of the Albina Engine & Machine Works. Had the repair of the "Nottingham" been let to that bidder, the stores would



have been supplied for the amount estimated by Mr. Cornfoot (Ap. 50-3). There is absolutely no reason, then, for asking the court to take Thorndyke's figures as against Mr. Cornfoot's tender.

(D) The next item which appellees would add to the cost of repairs is the sum of \$5780.

If the court will turn to the deposition of Mr. Bishop (Ap. 500-44), and, particularly, to page 519 thereof, and, again, to Bishop, Respondents' Exhibit 4 (general average adjustment prepared by Johnson & Higgins), it will note that the total of the *general average* stated, by the adjusters, on the "Nottingham", arising out of the accident, was the sum of \$8789.01. Again, if the court will turn to the adjustment, it will note that \$3,000 was paid to the Port of Portland in settlement of the salvage claims. The item of \$5,780 has, therefore, been obtained by appellees by deducting the \$3000, salvage paid the Port of Portland, from the total of the *general average* as stated in the adjustment. While not asking for the addition of the \$3,000 salvage (incorrectly stated by appellees as allowed by the court (brief p. 87), for it was a matter of private settlement without a trial), *because salvage is expressly excluded by clause 9*, yet appellees do request that the \$5780 be added to the cost of repairs, *notwithstanding that clause 9 equally excludes general average expenses*. Appellees seek to justify this by the statement that they do not consider these general average expenses. *If they were general average expenses, then admittedly they cannot be added to the cost of repairs under the conditions of clause 9.*



Appellees state that "the fault in appellant's position lies in the assumption that expenses incurred by the shipowner after abandonment and after the vessel reaches a port of refuge which is not a port of repair are strictly general average expenses, because the vessel owner, upon incurring such expenses for the common benefit of vessel and cargo, has a right to recover the cargo's proportion thereof from the cargo owner". Now, if the \$5780 were not general average expenses, so as to come within the exclusion of clause 9, on what grounds can their inclusion in a general average adjustment, prepared by the most competent adjusters on the Pacific Coast, appointed by appellees, be justified? The expenses were most certainly general average, for everything included therein was a voluntary expenditure made for the benefit of all interests, ship and cargo. *Appellees employed the leading adjusters in the United States to make up a general average adjustment, and, upon its completion, accepted the same as correct.* But not, however, until after appellees' manager had carefully scrutinized the adjustment and even commented upon some of its entries (Ap. 521-2, Exhibit 3). On the strength of the adjustment, *as a general average adjustment*, appellees collected from appellant \$3758.31 (Ap. 519), which was 30,000/45,000ths part of \$5637.46 (Ap. 519). The latter sum was the proportion of \$8780.01, *general average*, which the vessel was required to pay, on a valuation of \$8500. The balance of the *general average*, or \$3142.55, was collected from the cargo, on a valuation of \$4738.24 (Ap. 59; Bishop, Respondents' Exhibit 4).

*The aforesaid amount of \$3758.31 was collected by Johnson & Higgins, appellees' adjusters, from appellant as general average under the provisions of the marginal clause of the policies, specifying a liability for general average (Ap. 523).*

By what process of reasoning, moral or legal, it can be urged that the \$5780, charged by *appellees' general average adjusters*, and collected from appellant under the policies here in suit, *as general average*, is *not general average within the meaning of clause 9 of the policy*, is beyond our conception! Appellees cannot blow hot and blow cold at the same time. They cannot say that the \$5780 *was general average* under one clause of the policy obligating appellant to pay general average, and then assert that it *was not general average* under another clause of the policy making general average deductible from the cost of repair, for the purpose of determining whether or not a constructive total loss existed under the terms and conditions of the policy. If *it was general average* when recognition thereof was favorable to the interests of appellees, *it was equally general average* when adverse thereto.

Appellees admit that the \$3,000 salvage paid to the Port of Portland should not be added to the cost of repairs under clause 9, which specifically excludes salvage and general average expenses. The exemption does not, however, say "salvage award paid a salvor," but salvage expenses. Now, the costs of suit, attorneys' fees, marshal's fees, etc., which were charged by the adjusters to general average, the same as the \$3000, and which went to make up the total expense on account

of the salvage, were as much a part of the salvage expenses mentioned in clause 9, as the bare sum paid to the Port of Portland. The fact is, that the entire \$8780 was properly included by the adjusters under the head of *general average*, because it was for expenditures voluntarily made for the preservation of the vessel and cargo, in a port of refuge, before a separation of interests took place. Being general average, none of the items thereof can be added to the cost of repairs, because of the excluding provisions of clause 9.

The cases of *Wallace v. Insurance Company* and *Seward v. U. S. Insurance Company*, cited by appellees, decide nothing to the contrary. The cases stating the American rule are not in point because the case at bar is not one for the application of that rule. The rights and liabilities of the parties to this action are to be adjudged *by the contract embodied in the policies* here in suit, and not by something else.

*Soelberg v. Western Assur. Co.*, *supra*.

We respectfully submit, therefore, that no part of the \$5780 can be charged to the cost of repairs.

(E) Appellees would also add to the cost of repairs, the sum of \*\$1549.05 (erroneously stated as \$1554.78 and \$1554.14), which they say were expenses incurred by the owner "in these rescue operations which were incurred for the benefit of the vessel alone". They attempt to justify the addition of these items by the principle on which they would likewise charge the *general average*,

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\* This sum is stated in appellees' brief on pages 81, 107 as \$1554.78, and on page 90 as \$1554.14. Neither is correct for the total of the items of Exhibit A (pp. 105-107) from which the sum is taken is \$1549.05 and not \$1554.78 as printed.

just considered. The details of the total of the \$1549.05 are set forth in Exhibit A of the brief (p. 105). We shall briefly examine them, item by item.

\$600. This sum was paid Walker for services rendered appellees in preparation and presentation of *their claim* against appellant (Ap. p. 507). It was not for *labor* and *material* in repairs, on which the right to a constructive total loss must be based, under the provisions of clause 9. If part of it could be so charged, it would only be for the surveys made on December 20th and 21st, and the preparation of the specifications based thereon. The earlier survey has already been charged to general average. Certainly, Walker's services in connection with the preparation of appellees' claim are not chargeable, and, yet, appellees have made no attempt to segregate the charge. The statement in the general average adjustment discloses the general character of the services rendered.

\$45.10. This was paid the Port of Portland, \$5.10 being for the repairs to the donkey boiler to pump out the vessel, and \$40 for handling the sails at Astoria, subsequent to the abandonment. Perhaps the \$5.10 should go into cost of repairs, but certainly the handling of the sails *should not*, for that expenditure was to preserve the sails while the dispute over the alleged liability under the policies was pending. It was no part of the cost of repairs, and materials necessary to make the repairs (Ap. 506).

\$40.00. This was paid the Port of Portland for berthing the vessel from January 19th to February 8th. If appellees had proceeded with the repair of the



vessel, this charge would not have been incurred, as *it was wharfage paid while appellees were asserting their claims against appellant*. The specifications for repairs included wharfage during repairs, so that if appellees had proceeded to repair on receipt of the bids, this expense would never have been incurred. It was not, therefore, any part of the cost of repairs.

\$28.70. We admit, for sake of argument, that perhaps this charge should have been added, as it appears to have been for repair to the donkey boiler, although the cause of the damages is not shown.

\$38.00 These two sums were for the expenses of  
 \$107.00 Messrs. Clise and Thorndyke to San Francisco to consult their adjusters, and to attempt to settle with appellant, appellees' alleged claim for a constructive total loss (Ap. 511, 521-2, 562). They had nothing whatever to do with repairing the vessel. Certainly, expenses in attempting to secure a payment of the claim of liability under the policies, were no part of the costs of repairing the vessel, within the contemplation of clause 9.

\$23.60. This sum was expended in the interest of the owner, and constituted no part of the cost of repairs. If any of Walker's fees are chargeable, then certainly this is not, for Thorndyke rendered no services toward the repairs (Ap. 511).

\$34.20. This sum is not properly chargeable, as the tenders could as well have been received by mail in appellees' office at Seattle as in Portland. No



expenses would have been incurred in the former case. The expenditures were not, therefore, an essential part of the cost of repairs (Ap. 512).

\$25.20. This was for moving and drying sails on February 23d. If the vessel had been repaired in due course, this expense would never have been incurred, because she would have been in the repairer's hands long before February 23d. It was an expense resulting purely from appellees' delay in repairing, while it was trying to induce appellant to pay a constructive total loss, for which the latter had promptly denied liability, on October 16th—four months previous.

\$11.20. This was for the fare of the master in going to Seattle to consult Walker on March 2d. It could not have had anything to do with what the repairs would have cost, if the repairs had been made on receipt of the bids. What the conference was about is not disclosed by the evidence.

\$1.60. This was for hauling the ship on March 8th, and was no part of the cost of repairs. It was purely an expense incidental to the continued laying-up of the vessel. If appellees had repaired on receipt of the bids, it would not have been incurred.

\$9.60. This was for moving sails on March 27th, months after the bids for repairs were received, and the repairs could have been effected. It would not have been incurred as part of the costs of repairs.

\$58.00. This sum was for the board of the master from February 7th to April 12th, and certainly was no part of the cost of repairs.

\$3.00 These were expenses of the master on three  
 \$6.85 trips that could have had no connection with the  
 \$14.70 repairs. They were incurred while appellees  
 were still trying to induce appellant to pay a constructive total loss.

\$250. This was for the master's wages from February 15th to April 12th and can, by no pretense, be included as part of the cost of repairs. If the vessel had been repaired on receipt of the tenders in December, the expense would never have been incurred.

\$29.34. There is no evidence in the record as to what the telegrams and telephones were for, or to whom sent. Certainly, therefore, they cannot be included as part of the cost of repairs.

\$212. This expense was for wharfage incurred from February 15th to May 31st, when "the curtain of mystery" is said to have been drawn as to what became of the "Nottingham". Manifestly, it was for wharfage incurred during the period appellees were still seeking a settlement with appellant. It certainly would never have been incurred if the vessel had been repaired on the happening of the accident, or upon receipt of the tenders. It was not, therefore, in any respect, any part of the cost of repairs. How counsel can so represent it to this court passes our understanding.

\$10.96. This was for telegrams sent by the general average adjusters. If they had nothing to do with the general average, they certainly had nothing to do with the cost of repairs, for the adjusters were

in no way concerned with the repairs, but alone with the stating of the general average adjustment.

Of the \$1549.05, which appellees would thus add to the Page adjustment, *the following sums had absolutely no possible connection with the cost of repairs*, to wit: \$40, \$38, \$107, \$25.20, \$11.20, \$1.60, \$9.60, \$58.00, \$3.00, \$6.85, \$250, \$14.70, \$29.34, \$212, \$10.96, a total of \$817.45. Granting for sake of argument that all of the others were chargeable to the cost of repairs, as manifestly they were not,\* then such additional items to be so charged would only amount to \$731.60 (\$1549.05 - \$817.45 = \$731.60).

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#### SUMMARY.

Based upon the cost of repairs as established by the tender of the Albina Engine and Machine Works and the Gibbs-Walker agreement, as adjusted by Mr. Wilfred Page (Respondent Page's Exhibit No. 1), in accordance with the condition of the policies, *the amount which appellant would have been liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) would have amounted to \$9,540.66*, as follows:

The total of the particular average column, as

shown by the adjustment was.....\$18,913.65

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From this was deducted  $\frac{1}{3}$  off, leaving..... 12,609.10

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\* Take, for instance, the item of Walker's fee, \$600. The statement in the adjustment shows that it was for various services which were no part of the cost of repairing the damage to the vessel. Appellees attempt no segregation, but baldly insist that the entire amount be charged to repairs.

To this was added for consumable stores, from which there was no deduction of thirds...	1,500.
There was then added the proportion of the cost of bottom painting chargeable to particular average net.....	201.89

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Total of particular average net.....\$14,310.99

As appellant insured \$30,000 on a value of \$45,000, appellant's liability would have been 30,000/45,000 of the particular average or ( $\frac{2}{3}$  of \$14,310.99)..... 9,540.66

*This was \$5,459.34 (\$15,000—9,540.66=5,459.34) less than the amount required to give appellees the right to abandon.*

Now, grant that every addition should be made to the cost of repairs, which, by reason of any doubt or pretense, should not be omitted, still the amount which appellant would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage of general average and the cost of funds) would have fallen far short of one-half the amount insured, as follows:

The total of the particular average $\frac{1}{3}$ off column, as shown by the Page adjustment, was .....	\$18,913.65
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Of the Hall Bros. estimate, based on the Walker supplemental report, add everything that, as we have previously shown, could by any doubt or pretense be even considered as part of the cost of repairs necessary to restore the vessel to her former condition—

Items 4, 5, 7 and 8.....	355.
Supervision Expenses .....	975.

Also add all of the items of the Johnson & Higgins' general average adjustment, as set forth in Exhibit A, pages 105-7 of appellees' brief, not therein charged to general average, which we have just considered, and which on any doubt whatsoever could have been charged to cost of repair, viz., the sum of..... 731.60

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\$20,975.25

Deducting  $\frac{1}{3}$  off, leaves.....\$13,983.50

To this add for consumable stores..... 1,500.

Also add the proportion of the cost of bottom painting chargeable to particular average net ..... 201.89

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Total of particular average net.....\$15,685.39

As appellant insured \$30,000 on a value of \$45,000, appellant would have been liable to pay  $30,000/45,000$  or  $(\frac{2}{3} \times 15,685.39) \dots 10,456.93$

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*This would have been \$4,543.07 (\$15,000—\$10,456.93= \$4,543.07) less than the amount required to give appellees the right to abandon.*

Again, assume for sake of argument, that the criticisms and aspersions which appellees make of the Cornfoot tender to furnish the consumable stores, were justified, although they are not, and that Thorndyke was right that the stores, instead of costing \$1500 would have cost \$2370.14. And resolving all other doubts in appellees' favor, as we have done in the preceding statement, *still the amount which appellant would have been*



*liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) would have fallen far below one-half of the amount insured, as follows:*

The total of the Particular Average  $\frac{1}{3}$  off column, as shown by the Page adjustment, was .....\$18,913.65

Add as above from Hall Bros. estimate,

Items 4, 5, 7 and 8..... 355.

Supervision expense ..... 975.

Also add the items of the general average adjustment, not charged therein to general average, which we have just considered... 731.60

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Total of Particular Average  $\frac{1}{3}$  off column would be .....\$20,975.25

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Deducting  $\frac{1}{3}$  off, leaves..... 13,983.50

Now, add, instead of \$1500 for consumable stores, as above, Thorndyke's estimate of 2,370.14

Also add the proportion of the cost of bottom painting chargeable to particular average 201.89

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Total of Particular Average net.....\$16,555.53

As appellant insured \$30,000 on a value of \$45,000, appellant would have been liable to pay 30,000/45,000ths, or ( $\frac{2}{3}$  16,555.53). 11,037.02

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*This would still have been \$3,962.98 (15,000-11,037.02=3,962.98) less than the amount required to give appellees the right to abandon.*

Unless, therefore, the court assumes what, we respectfully submit, is an absolutely untenable position, and adds to the cost of repairs the total amount of the general average, less the bare sum of \$3,000 paid the Port of Portland for salvage, and including in the general average so added all of the other salvage expenses, *it is impossible to make a constructive total loss, or anywhere near it, under the conditions of clause 9 of the policies, even though all other items upon which there can be any doubt, are included in the cost of repairs.*

We respectfully submit that in whatever aspect the costs of repairs are considered, appellees did not have the right to abandon as for a constructive total loss under the policy terms.

Appellees go still further and insist that the Albina bid should be disregarded, and those of the other three bidders should be taken, or at least averaged. There is no reason, in justice, why the acceptance of the Albina tender should be refused. As we have pointed out in our opening brief, it was made by experienced ship repairers, constantly engaged in the same business, and was backed up by the required bond of a standard surety company. If appellees had seen fit to have *then* repaired the "Nottingham", such repairs could most certainly have been made for the amount of the tender.

The aspersions which appellees would cast upon the Albina bidders, by the "stab in the back" intimations that the estimates were careless, or made through an "over anxiety to secure the work on the part of some contractor" (brief p. 98), or that "a bidder may be

influenced to make a bid below actual cost in order to provide work for his plant, and be willing to take a loss on the work rather than suffer a greater by permitting his plant to stand idle and his employees to seek employment elsewhere"; or that "he may also be influenced by a desire to aid underwriters in escaping a claim for a total loss in order to secure their favor and patronage in other work later" (brief pp. 66-67), are unjustified. Such innuendoes come with ill grace from appellees, who, once before, attempted to discredit the Albina bidders, and were afterwards forced to a confession that they were mistaken (Ap. pp. 376-7, 59-60). It is needless to say that not a word in the record even hints to a carelessly prepared estimate, or to an over anxiety to secure work, or to a bid below cost to provide work for an idle plant, or to an influence to aid an underwriter to escape a loss. Of course, appellees do not come out squarely and say that appellant wielded such influence, because they know that there is not a vestige of truth in their suggestion. They resort to veiled insinuation.

We have called the court's attention to this attitude on the part of appellees because of our inability to pass the innuendo by without a just resentment, and because it shows a desperation of mind about the case that, for the moment, has unbalanced the author of appellees' brief. If not, they would stick to the record.

The Albina bid was not secured by appellant, but by appellees upon specifications prepared by their own surveyor. If it was so far wrong that it should not have been accepted, and the other bidders were right, then appellees could have so easily called those bidders as

witnesses, as did appellants, Mr. Cornfoot and Mr. Mackintosh. But no, they contented themselves with alone offering in evidence the hearsay tenders. We respectfully submit that if the Albina Engine and Machine Works, and Messrs. Cornfoot and Mackintosh, were capable and responsible enough to make similar repairs to vessels of the U. S. Government, they were to repair the "Nottingham" (Ap. pp. 43, 67-8), and that their bid should be accepted in estimating the cost of repairing the "Nottingham".

The statement is made by appellees: "the repairs were never actually made. \* \* \* Not having been repaired, the cost of repairs must be estimated" (brief pp. 92, 94). If by those remarks is only meant that the "Nottingham" was not repaired under any of the tenders or specifications here in question, or by any of these bidders, the statements are true, but that is as far as they are true, or that this court is permitted to go in attributing any meaning to the statements.

Stress is laid upon an alleged risk of towing the "Nottingham" from Astoria to St. Johns. Indeed, appellees go to the extreme of saying: "If she had stranded on any of the river bars, she would probably have broken up, in her weakened state at that time" (brief p. 92). Imagine it! If she had stranded on a *sand bar* in the admittedly smooth waters of the Columbia River, she would *probably* have broken up, in her *weakened* state! Did any witness so testify? *No*. Why, if she had stranded, and the towing vessel, which so carelessly put her aground, could not have pulled her off, all that would have been required to



lighten her, and thereby free her from the stranding, would have been the jettisoning of her lumber cargo, part of which was still on deck.

And as to her then weakened state, certainly her master did not find any evidence of it when he made his examination on the telegram of December 21st (Ap. pp. 317-18). Walker could not have thought her very *weak* when he said that the only way that he could account for the water getting in was through the hatches (Ap. p. 355). Nelson did not consider her in a weakened condition (Ap. p. 444). And even counsel stipulated that the caulking of her bottom and removal of the entire keel, was unnecessary, except as provided in the specifications.

The fact is, that there was no danger attached to her removal from Astoria to St. Johns, except such as was incidental to an ordinary towage on the river. Not only did Captain Gibbs so consider it, but so did Walker (Ap. Walker, 221, 229; Gibbs, 401-2). Walker testified:

“If the channel is properly followed there is not much danger.”

The law presumes that ordinary towage skill would be exercised. No reason appears for not doing so.

Appellees' effort to discredit the bid of the Albina Engine and Machine Works, and to bring in a great peril of towage in the Columbia River, lamentably fails, under the evidence. Despite it all, *the fact remains that*, taken in its aspect most favorable to appellees, and resolving every possible suggestion of doubt in their favor, *a right of abandonment, as for a constructive total loss, did not exist under the policies.*



## IV.

**THERE WAS NOT AN ACTUAL TOTAL LOSS UNDER  
THE PROVISIONS OF THE POLICIES.**

It is contended that the "Nottingham" was an actual total loss because, it is said, the correct rule of law is that an absolute total loss of the vessel exists if a damage is so great as to destroy all value of the vessel as a vessel, so that it would cost more to put her in a condition for use as a vessel than she would be worth after repairs.

One case is cited to support the rule of law so stated, that of

*Insurance Co. v. Fogarty*, 19 Wall. 640.

The question of total loss in that case did not arise with respect to a vessel, and, of course, not under the form of policy here in suit. Whatever it may hold, then, as to actual total loss of cargo, is beside the question. But, with all of that, the decision does not announce a principle which supports appellees' contention as to what the rule should be. It was a case of damage to a machine of many parts, knocked down and shipped in eight separate pieces. The court said:

"The circuit court was right in holding that what was insured was machinery—pieces or parts of a machine, pieces made and shaped to unite at points with other pieces, so as to make a sugar packing machine. If parts of them were *absolutely lost*, and every piece recovered had lost its *adaptability to be used as part of the machine*; had lost it so entirely that it would cost as much to buy a new piece just like it, as to repair or adapt that one to the purpose, then there was a total loss of the machinery. If no piece recovered was of any use,

or could be applied to any use connected with the machine of which it was a part, without more expense on it than its original cost, then there was no part of the machinery saved, however much of rusty iron may have been taken from the wreck. The court went quite as far in behalf of the defendant as the law justified, when it told the jury that the plaintiff could not recover if any piece or portion of the machinery insured arrived at its destination in a condition so perfect that it could have been used with its corresponding or connecting pieces, had they also arrived in good condition."

The court will note that the test there applied was whether every piece recovered had lost its *adaptability to be used as part of the machine*. In the case at bar, it certainly cannot be urged that the "Nottingham" had lost its *adaptability to be used as a part of a vessel*; it was still a vessel, damaged and in need of repair. The decision does not support any principle by which the "Nottingham" could be held to have been an actual total loss under the policies.

The case of

*Burt v. Brewers Ins. Co.*, 9 Hun 383, affirmed in  
78 N. Y. 400,

establishes the law as to what shall constitute an actual total loss. The court said:

"When the ship in the course of her voyage, and by the agency of the perils insured against, becomes an absolute wreck, when she has been broken in pieces and dismembered so that her planks and apparel are scattered on the sea, this is a case of absolute total loss on ship, though the whole or greater part of the fragments may reach the shore as wreck. In such case, it is quite clear that the ship, as a ship, is totally destroyed, the ship has

perished, only the wreck remains. \* \* \* where the liability of the underwriter is expressly restricted to an absolute or actual total loss, there must exist such a state of things as that the subject of insurance is wholly destroyed as that thing, in specie, which was insured, or, at all events, there must be left no *spes recuperandi*."

The court quoted the following from *Murray v. Hatch*, 6 Mass. 465:

"Whether the injury sustained, and the expenses of salvage, rendered the voyage of no value, and not worth pursuing, is not a question to be considered where the policy is restricted to the case of a total loss. That case is only proved by showing the destruction of the thing specifically. \* \* \* But if afloat, and if she was capable of being repaired at any expense, it was not a total loss within the meaning and intent of the policy relied on in this case."

This court has squarely passed upon the question under a policy identical in form with those in suit, in a case that remains unrefuted by appellees, save in a single instance, viz.,

*Soelberg v. Western Assur. Co.*, supra.

After a review of the authorities, Judge Hawley, commenting upon the case of

*Bullard v. Insurance Co.*, Fed. Cas. 2122, said:

"It will thus be seen that the judge instructed the jury as to the distinctions which existed in different kinds of policies. The entire charge of the court clearly shows that *the fact that when the vessel was repaired it would not be worth the cost of repairs did not prove a total loss within the terms of the policy*. The jury found a verdict for a partial loss only." (Italics ours.)

Continuing, after reference to other cases, Judge Hawley said of the case before him:

*“We are of the opinion that these authorities sustain the proposition that the evidence in this case, which consists of mere proof that the cost of repair would exceed the value of the ship when repaired, does not, under the provisions of the policy, prove either an actual total loss, or a constructive total loss, and does not prove a partial loss.” (Italics ours.)*

The contention which appellees have advanced has thus not been sustained by the authorities. Inasmuch as the court was passing upon the form of policy in the instant case, we take it that the decision definitely settles the law in this court against the rule which appellees would invoke.

It is said that the “Nottingham” was so damaged that she was worthless as a vessel, and had no value except for the junk value of her material. This is based upon the testimony of appellees’ manager and surveyor. It is also stated that her value was \$5,000, and that such value was fixed by the stipulation appearing on page 386 of the Apostles. No stipulation appears on that page, but we take it that appellees refer to the stipulation on page 349, stating:

“It is further stipulated that on April 15, 1912, proctor for libelant made a give or take offer for the ‘Nottingham’ of five thousand dollars, said offer being without prejudice to the rights of either party in the pending litigation.”

In several instances, appellees speak of that stipulation as having established an open value for the “Not-



tingham" at the time of abandonment. It shows on its face that it is but a stipulation admitting an offer by libellant's proctor on April 15, 1912, of \$5,000 for the vessel. The offer was made nearly six months after the accident, and was in no sense an agreement as to value. The fact that appellees made an offer of purchase and of sale, six months after the loss, did not establish the vessel's value at the time of abandonment, and *most emphatically did not bind appellant to an admission that such was the value*. Nor, as appellees state, did the stipulation constitute or embody an agreement to that effect.

The very fact that the offer was not accepted on April 15, 1912, shows that appellant did not consider \$5,000 as the value. Appellees knew that appellant was an insurance company, and not a shipowner. It was not in the business of purchasing or owning vessels. Because it was not in that business, however, it was not willing that appellees should take the vessel with any understanding that it was only of the value of \$5,000. Hence, the offer was declined.

Why should not the offer as to value have been declined? Appellees had a general average adjustment made of the losses caused by the accident, and collected from appellant 30/45ths of the general average against the vessel. The total amount of the general average was \$8,780.01, of which the vessel paid \$5,637.46, and the cargo, \$3,142.55. Appellant paid \$3,758.31, or 30,000/45,000ths of the \$5,637.46. Now, *the proportion charged against the vessel was based on a value for the vessel of \$8,500 as she arrived at Astoria*. On that value,



appellees claimed against, and collected from, appellant, through its adjusters. Is it any wonder, then, that appellant would not accept, without prejudice, a value of \$5,000 for the vessel? Appellees are thus not in an equitable position to claim a value of \$5,000, despite the testimony of Walker and Thorndyke.

It is said that the vessel would not have been worth repaired, more than \$24,000 or \$25,000, and that such value was established by the uncontradicted testimony of Thorndyke and Walker. It is true that no witness contradicted them in so many words; that was not necessary, for the utter unreliability of their estimates is shown by the facts.

It is a fact recognized by the maritime law, that a vessel benefits by repairs. So certain is this true, that it has become the law to deduct one-third from the cost of all repairs, as a commutation for the difference between new and old. That is to say, the replacing of new material for old, in repairs, so betters the vessel that it has for many years been customary to deduct one-third from the cost of repairs. It is absurd, in the face of this settled principle, for appellees to assert that the vessel repaired would be worth less than before the accident. And any amount of testimony by Walker or Thorndyke would not establish to the contrary.

Now, appellees cannot deny that in April, 1911, the "Nottingham" was worth at least \$30,000, for that was the amount of insurance which they took out upon her. It is elementary that one cannot overinsure his property. Yet, appellees are here asking \$30,000 because of

a *total* loss! If, in fact, therefore, the “Nottingham” was not worth \$30,000 in April, 1911, *she was over-insured*, and a fraud was perpetrated upon appellant. Appellees are certainly not in the equitable position to deny it. If the “Nottingham”, with her value enhanced by repairs (and there is no evidence that it would not have been), would only be worth \$30,000, on what theory can a claim for that amount, based on total loss, be justified?

We have Thorndyke’s admission that the value of the vessel had enhanced since April, so that, at the time of the loss, she was actually worth more than the \$30,000 (Ap. 378).

The “Nottingham” must have been at least eight years old, for she was last caulked in 1907 (Ap. 235), so that four years was allowed to elapse between caulking. Now, is it reasonable to believe, and can any weight be given to the testimony of any manager or surveyor who so testifies, that under the foregoing conditions, the repaired “Nottingham” would only have been worth \$25,000? Let us glance at the specifications, and see the new material that would have gone into her (see Apostles, pp. 91-117): Three new masts, booms and gaffs; new chain plates, new rigging for at least all three masts; new running gear; repairs to hull, caulking and painting of decks and hull; cabin rebuilt and completely refurnished, etc., etc.,—*all betterments*.

The absurdity of any contention that the “Nottingham”, worth \$30,000 in April, 1911, with value enhancing to October, would only have been worth \$25,000,

after being rebuilt and refitted at a cost of nearly \$21,000, as the specifications provided, is too plain. The opinions of Walker and Thorndyke on the value were on a par with their testimony on the other points on which they have been so thoroughly discredited.

The truth is, as thus established by the evidence, that the "Nottingham" when repaired would have been worth far more than \$30,000. With the repairs, then, costing \$20,950, and the vessel's proportion of the salvage and general average, to wit, \$5,637.46, the outlay would only have been \$26,587.46. And if you add to that the \$1,549.05 (Exhibit A, brief pp. 105-7) not charged to general average; and add again the \$355 of the Hall Bros. estimate, about which there might be some doubt; and charge the \$975 for Walker's supervision, thus resolving every doubt in appellees' favor, still the expenditures would only total \$29,466.51—*not only less than \$30,000, but certainly far less than what the "Nottingham" would have been worth repaired.*

Appellees have never regarded the vessel as an actual total loss. If they had, they would not have abandoned for constructive total loss by the notice in writing on Monday, October 16th, and have later attempted to prove by Thorndyke a verbal abandonment to Taylor on Saturday afternoon, the 14th, at a time when, it turned out, Taylor was not in town. They would not, in the next place have brought this action on the theory of a constructive total loss. Appellees knew that the "Nottingham" was not an actual total loss. She was still a ship, her hull and foremast and rigging being intact, though damaged. She still had on board a large

part of her cargo. She was libeled by the Port of Portland for \$33,000 for salvage, a claim that would not have been made had the officials of that municipal corporation considered her valueless as a vessel. A general average was stated and collected on her, as a vessel, by adjusters appointed by appellees. She was towed to St. Johns to be docked for the express purpose of ascertaining whether the cost of repairs made a constructive total loss under the policies. Tenders were taken upon her as a vessel for the repairs. Look at the photograph, an exhibit, taken of her as she lay at Astoria, and she gives every appearance of a vessel, save the loss of three masts. In the face of that array of facts, *it cannot be said that the "Nottingham" had lost her adaptability to be used as a vessel*. Most certainly she was not an actual total loss.

The result is that not only was there not an actual total loss *under the policies and the law*, as laid down by this court in

*Soelberg v. Western Assur. Co.*, supra,

but under appellees' contention as to the law, the facts do not make an actual total loss.

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## V.

### **ABANDONMENT.**

#### **The Alleged Verbal Abandonment**

##### **Was Not Made.**

We shall reply under this head note to appellees' argument in part IV of their brief.



It is now claimed that Mr. Thorndyke made a verbal abandonment of the "Nottingham" on Saturday, October 14th, the day before she was towed into port, and two days before the written notice of abandonment. We have already commented upon this testimony of Thorndyke's in our opening brief at pages 42 to 47.

It is, indeed, interesting to note the attempt made by appellees to escape from the effect of Mr. Taylor's diary. It is now suggested by counsel, *not by Thorndyke, for he was not recalled after Taylor's testimony, although abundant opportunity therefor was presented*, that the alleged verbal abandonment was probably made at night to Taylor after nine o'clock, subsequent to the time he reached home from Tacoma. *Did Thorndyke even hint at such a possibility? He did not.*

He testified with great positiveness:

" \* \* \* *thinking it over in connection with the times the testimony was taken and during those periods, keeping the matter constantly in my mind, why, I am now prepared to state that I called Mr. Taylor up in the afternoon of Saturday, the 14th of October and notified him that I had received a telephone message from Mr. Plummer etc.*" (Ap. p. 552).

And with equal asseveration, he stated on cross-examination:

"Q. *What time was it, in the afternoon of Saturday, that you telephoned Mr. Taylor?*

A. *I say something about three o'clock; it may have been after.*

Q. *At his office?* A. *Yes, sir.*

Q. *Is Mr. Taylor usually at his office on Saturday afternoons?*



A. *I do not know; he was there that afternoon*" (Ap. pp. 559-560).

Is there any testimony, even a word, that now justifies appellees asserting that this conversation took place with Taylor at his home after nine o'clock at night? Why, a witness could not have been more positive than was Thorndyke, when, with his face aflame, he fixed the time and place with such certainty. He was not then testifying two years after an event, from an unrefreshed memory, as appellees impliedly suggest when they say:

"the testimony on this subject was brought out some two years after the event. It is not reasonably to be expected that Mr. Thorndyke would accurately remember the exact hour or place when he conveyed this information. \* \* \* " (brief p. 47).

Thorndyke had previously sworn to the libel alleging the written notice of abandonment, and had thereafter testified to the written notice of abandonment at the instance of appellees' counsel, and since then, had talked with them about this alleged verbal abandonment. As a preliminary explanation to his statement, he testified:

"I had not gone very deep into the case, and had not given it as much thought as *I had reason to give it since then*, and I stated that I thought we exchanged telephones at that time, but since that time, *in thinking the matter over, in my office—thinking it over in connection with the times the testimony was taken and during those periods, keeping the matter constantly in mind*, why, I am now prepared to state that I called Mr. Taylor up in the afternoon of Saturday, the 14th of October, and notified him etc." (Ap. p. 552).

That is not the testimony of a witness suffering from a lapse of memory, or a recollection dimmed by time. He made no suggestion of a possible faulty memory, but proceeded to state, with professed accuracy, a conversation in which he would have had the court believe an abandonment was made. If his memory was as defective as counsel now suggest, and perhaps as counsel thought when he chided him for not sticking to the truth (Ap. p. 557), why should this court place any dependence upon his statement as to the alleged verbal abandonment? Taylor's denial thereof stands uncontradicted, and the very wording of the written notice of abandonment given on the 16th, challenges any thought of a verbal abandonment made the day before the written notice was prepared (Ap. p. 558). If the verbal abandonment had been given, the written notice would have been a confirmation thereof,—not an independent notice of abandonment.

We submit that the evidence does not justify even the inference that a verbal notice of abandonment was given.

### **Thorndyke Without Power to Make Valid Verbal Abandonment.**

But even if it had been given, it would not have been good. Not because it would have been verbal, but because the "Nottingham" was an encumbered vessel, mortgaged to the Trust Company of America (Ap. p. 339). Mr. Clise testified that he looked after the interest of the trustee in the property (Nottingham) covered by the policies. And he specifically stated that

the written notice of abandonment (Defendant's Exhibit 16) was given under his direction (Ap. 339, 340). He does not claim that the alleged verbal abandonment was made under his authority, and, indeed, it later appeared that not Mr. Clise, but Mr. Poe, prepared the written notice, and that, in fact, Mr. Clise was in San Francisco at the time (Ap. 560). The alleged verbal abandonment would have been ineffectual, for Thorndyke had no authority to convey the interest of the Trust Company.

*Arnould on Marine Ins.*, 8th ed., p. 1433;

*Soelberg v. Western Assur. Co.*, supra;

*Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249;  
Sec. 2724, *Cal. Civ. Code*.

**Abandonment Condition Precedent to Claim for  
Constructive Total Loss. The Victoria Case  
Holds Nothing to the Contrary.**

Appellees next proceed to the contention that a notice of abandonment was not necessary at all to give them the right to claim a constructive total loss, but that their right thereto was determined by the condition of the vessel at the time of her abandonment by the crew. Authority for this astoundingly new doctrine of constructive total loss is said to have been found in

*Victoria S. S. Co. v. Western Assur. Co.*, 167 Cal.  
348; 139 Pac. 807,

a decision of the Supreme Court of California, referred to in our opening brief.

Whatever may have been the ruling of the court in that case, *it has no bearing upon the case at bar because*

of the difference in policies. It was said by Judge Hawley in

*Soelberg v. Western Assur. Co.*, supra:

“Parties must be governed by the terms of the contract which they have entered into, and are not bound by the rules which apply only to other and different kinds of contracts.”

Here the policies provide that

“the insured shall *not* have the right to abandon the vessel unless the amount which this company would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured.”

In the case cited, the right to abandon as for a constructive total loss under the policy on freight was fixed by the provisions of the California Civil Code, and not by any clause bearing any similarity to Clause 9 of the policies in suit. What the court may have said, then, as to constructive total loss under a freight policy, determined by the provisions of the Civil Code, *throws no light upon the rights as to constructive total loss under the present policies.*

Furthermore, the case does not, we respectfully submit, hold what appellees contend for it. They have grossly misstated the facts, and thereby given to the decision a distorted meaning. For instance, as a preliminary explanation to the quotation of the excerpt in which the court spoke of there being no necessity of an *actual* abandonment, appellees stated, on page 49 of their brief:



“There had been an abandonment of the vessel by her owner, but there had *not* been an abandonment of the freight by the owner of the freight. On this state of facts, the underwriter contended that there could be no recovery, as the policy was free from partial loss and particular average, and there had been *no* abandonment as to freight.”

Again, on page 51 of their brief, appellees say:

“The action was to recover for a constructive total loss of freightage *when there had been no abandonment as to freightage*; consequently the question presented was, can there be a recovery for constructive total loss of freightage *without abandonment?*”

By these statements, the impression sought to be left is that the issue was as to whether there could be a recovery for constructive total loss under the policy on freight, where there had *not* been an abandonment of the freight by the owner thereof, but where there had been an actual abandonment of the vessel. Now, the facts were the very opposite to those stated by appellees, and the issue was an entirely different one, as this court will readily ascertain, if it will but look at the record. The policy was on the freight, *and immediately on receipt of news of the disaster, the assured* (charterer of the vessel) *under the freight policy abandoned the vessel to the insurance company and claimed upon it a total loss.* This abandonment of the freight was alleged in paragraph 6 of the complaint, appearing on page 6 of the record, and was admitted by the answer on page 9 of the record. The vessel itself was *actually* (physically) abandoned by her officers and crew as a total loss, but there is nothing in the entire record to show an abandon-



ment of the vessel as for a *constructive* total loss under a policy of insurance. In truth, there was none, for the total loss was, in fact, actual. There was, then, this situation, that the vessel was an actual total loss, but no abandonment was made for constructive total loss; on the other hand, there was an abandonment for constructive total loss of the freight by the charterer under the freight policy,—the very opposite conditions to those stated by appellees.

If, in these circumstances, the provisions of paragraph 4, section 2717, had been literally enforced, a valid claim for a constructive total loss could not have been made out, because, while there had been an abandonment for constructive total loss under the freight policy, there had been none therefor under a policy on the ship. Yet, that is seemingly the condition to an abandonment for a constructive total loss on freight, stated in paragraph 4, as follows:

“If the thing insured, being cargo or freightage, the voyage cannot be performed nor another ship procured by the master, within a reasonable time and with reasonable diligence, to forward the cargo, without incurring the like expense or risk. *But freightage cannot in any case be abandoned, unless the ship is also abandoned.*” (Italics ours.)

Furthermore, there could have been no abandonment of the vessel under her hull policy by the insured under the freight policy, because the latter was not the owner of the vessel, but the charterer. Naturally, therefore, he had no insurable interest under any hull insurance that vested in him the power *to abandon the vessel* as for constructive total loss. But, even if he had, the act

of abandonment would have been purposeless, in view of the fact that the vessel was an actual total loss.

The result was that notwithstanding that the loss on the freight was sufficient in amount to make a constructive total loss under section 2717, the right to abandon therefor, under the freight policy, was blocked if the court held that the ship must also be abandoned for a *constructive* total loss. It was in these circumstances that the court said:

“There was an *actual* total loss and destruction of the ship and an *actual* abandonment thereof. No *constructive* abandonment was necessary as to the ship. Hence, the freightage could be *constructively* abandoned, notwithstanding the provision of section 2717 that ‘freightage cannot in any case be abandoned, unless the ship is also abandoned’.”

That the court was making a distinction between *actual* abandonment and *constructive* abandonment is, of course, patent from its use of those terms. It pointed out that there was an *actual* abandonment of the ship upon its total loss and destruction. No *constructive* abandonment of the ship in the sense of abandoning for a constructive total loss was then necessary, and, clearly, that it is what the court meant when it said:

“No *constructive* abandonment was necessary as to the ship.”

Because of the *actual* total loss of the vessel, and *actual* abandonment thereof, making a *constructive* abandonment of her unnecessary, the court then stated:

“Hence, the freightage could be *constructively* abandoned, notwithstanding the provision of sec-

tion 2717 that 'freightage cannot in any case be abandoned unless the ship is also abandoned'."

Plainly, then, the court was not using the words *actual abandonment* in the sense of an *abandonment as for constructive total loss* when speaking of such an abandonment. It referred to the latter as a "*constructive abandonment*." Hence, when the court stated in the first sentence of the excerpt quoted on page 49 of appellees' brief:

"It is not necessary under this section (2717) that there should be an *actual* abandonment", (Italics ours),

it did not mean that *notice of abandonment*—constructive abandonment, as the court is pleased to term it—*as for constructive total loss* was unnecessary. It is obvious that the court could not have intended any other meaning than that which we have attributed to it, for there was no question in the case of want of notice of abandonment as for constructive total loss—constructive abandonment—so far as concerned the freight policies because notice of such abandonment had been given as was admitted in the pleadings. If, of course, the fact had been as appellees state (brief p. 49), that the underwriter contended that there could be no recovery as the policy was free from partial loss and particular average, and there had been no abandonment as to freight, the language of the court might have been possible of other interpretation. But *those were not the facts*, and the court was not speaking with reference to any such condition. It was treating of a situation where there had been a partial earning of the freight

money by cargo having gone forward to destination, and where an abandonment—*constructive* abandonment—had been made as for constructive total loss under the freight policy.

That the court did not hold that notice of abandonment as for constructive total loss—constructive abandonment—was unnecessary, under 2705, to a claim for constructive total loss, is shown not only by what we have already pointed out with respect to the decision, but by the court saying:

“Hence the freightage *could be* constructively abandoned *notwithstanding* the provisions of section 2717, that ‘freightage cannot in any case be abandoned unless the ship is also abandoned’.”

That an abandonment—constructive abandonment—as for constructive total loss is a condition precedent to a claim therefor, is made conclusively evident by the remaining sections of that article of the Civil Code of which section 2717 is a part.

Section 2718 provides that “an abandonment *must be* neither partial nor conditional”. By section 2719, “an abandonment *must be* made within a reasonable time after the information,” etc. Why *must be*, if not necessary? Section 2720 provides, *inter alia*, that where the thing insured was so far restored when the abandonment was made that there was then in fact no total loss, the abandonment *becomes ineffectual*, a condition that would be meaningless if an abandonment was <sup>un</sup>necessary to a claim for constructive total loss. Section 2721 stipulates as to how abandonment shall be made, and section 2722, the requisites of the notice. By section 2723, it is



provided that an abandonment can be *sustained only upon the cause* specified in the notice thereof. If abandonment were unnecessary, as appellees contend, why the need of sustaining it at all?

The enactment of the foregoing sections as part of the article on abandonment, in which section 2717 appears, shows to a demonstration that an abandonment is necessary to a claim for constructive total loss. To hold that it is not, as appellees assert the Supreme Court of California has now construed the law to be, would render the code provisions just referred to, ineffectual. It would overturn the settled principles of insurance law that abandonment is a condition precedent to a claim for constructive total loss.

*Soelberg v. Western Assur. Co.*, supra;

*Standard Marine Ins. Co. v. Nome Beach L. & T. Co.*, 133 Fed. 636, 643.

*Am. & Eng. Ency. of Law*, 1st Ed., Vol. 14, p. 395; 26 *Cyc.*, 695;

*Parsons on Insurance*, Vol. 2, p. 107;

*Arnould on Marine Ins.*, 8th Ed., Sec. 1092;

*Phillips on Insurance*, Vol. 2, Sec. 1491.

We respectfully submit that appellees have misconstrued entirely the effect of the decision in *Victoria S. S. Co. v. Western Assur. Co.*, supra, and that it is not an authority for the court holding that an abandonment was unnecessary as a condition precedent to a claim for constructive total loss. Appellees' rights, therefore, must be measured as at the time of the written notice of abandonment, to wit, on Monday, the 16th day of October, 1911, at which time the "Nottingham" was



securely at anchor, in her damaged condition, in Astoria harbor.

The case of

*Peele et al. v. Merchants Ins. Co.*, Fed Cas. 10905, is cited by appellees. The decision, however, is not in point, as the policy there under consideration was entirely different in form. That decision was the one, more than all others, which brought about the change in form of policy, and resulted in the adoption of practically the form here in suit. See cases cited on page 37 of appellants' opening brief, containing a history of the change.

Appellant does not make the concessions appellees would attribute to it in the concluding paragraph on page 53 of their brief. Appellant has not so stated, nor does it in fact. And, particularly, does appellant not concede that abandonment before the wreck had been picked up would have been ineffectual. The provisions of the policies (clause 9) alone prescribe the conditions under which abandonment could be made.

Appellees' rights, if any, to claim for constructive total loss are determinable by the written notice of abandonment given on Monday, October 16th, and by the conditions then existing, and by no other notice or at any other time or under any other conditions.

**Abandonment for Constructive Total Loss Not  
Predicable upon Actual Abandonment of  
Vessel at Sea, or Possession by Salvors.**

It is the contention of appellees that clause 9 of the policies does not mean what it expressly says, viz.:

That the insured *shall not have the right* to abandon except upon the conditions therein stated, but, on the contrary, that the insured *shall have the right* to abandon on conditions other than those specified. The plain reading of clause 9 does not permit the construction proffered by appellees. The clause fixed in unambiguous terms the conditions under which the right of abandonment existed. Had it not been intended to so operate exclusively, it would not have so unequivocally stated. Appellees point to no provision of the policy even tending to detract from the positive conditions of clause 9, but advance their own assertion, without foundation on any clause in the policy to which they can point. Such argument is offered solely by way of inducement to the proposition that, without regard to the damages suffered by the "Nottingham", the right to abandon existed while, and because, the vessel was in the possession of the salvors, who had brought her into port after her actual abandonment by the crew.

Clause 9, of course, has nothing to do with an absolute total loss by pirates, etc., liability for which arises independently of the right to abandon. They are moot questions, not involved in the present case, and merit no discussion.

Coming then to the case before the court, it is suggested that because the "Nottingham" was abandoned at sea by her crew, and was thereafter brought into port by salvors, and subsequently libeled for salvage, a right of abandonment existed independently of the conditions of clause 9. In other words, the contention is that appellees had the right to abandon as for a construc-

tive total loss independently of the conditions of clause 9, while, and because, the vessel was in the hands of the salvors.

No case has been cited by appellees, nor have we, after careful research, been able to find one, in which a court has held that an insured owner has the right to abandon for constructive total loss because the vessel is held by salvors, after having salved her as a derelict. And yet that is the essence of appellees' present contention.

Certainly the case of *Cossman v. West*, 6 Asp. 233 (N. S.), does not so hold. The question there under consideration was whether an absolute total loss resulted from the sale of the barque "L. E. Cann" in a suit for salvage by salvors, who had salved her after her abandonment at sea. The court, distinguishing the case from *Thornely v. Hebson*, 2 B. & Ald. 513, held that an absolute total loss existed, for the owner was not in default in not preventing the sale, as he was not, as in *Thornely v. Hebson*, near enough to have acted. The court said that

"assuming that the presence of the salvor constituted a constructive total loss, but not an absolute total loss, and that there was still a chance that the vessel might be redeemed and restored, the sale under the decree of the court removed, as Lord Abinger remarked in *Roux v. Salvador* (ubi sup.), all speculation upon that subject, and entitled the plaintiff to treat the case as one of total loss without abandonment".

There had been no abandonment, and hence no ground for a claim of constructive total loss. That question was not in the case, and while the court held that

the judicial sale had created an absolute total loss, *the case does not decide*, as asserted by appellees (brief pp. 59, 65), *that possession by a salvor who had salvaged a derelict, constitutes a constructive total loss* under the form of policy before that court. The use of the words "assuming that their possession constituted a constructive total loss," upon which appellees bear with pressure, does not make the case a decision by the court that a constructive total loss existed under those conditions. *And particularly is it not a holding that a constructive total loss would then exist under the form of policy here in suit.*

*McIver v. Henderson*, 4 M. & S. 576,

does not decide the proposition which appellees state for it on page 63 of their brief, but simply holds that the vessel and her cargo had not been so far restored after capture, as to reduce a total loss to an average loss. The court expressly pointed out that no contention was made that there was not sufficient ground for abandonment.

And as for *Thornely v. Hebson*, 2 B. & Ald. 513, the case only holds that even a judicial sale for salvage, did not constitute an absolute total loss, because the owners had not used all the means in their power to prevent the sale.

*Peele v. Insurance Co.*, *supra*,

is not in point. Not only was the policy radically different from the present policies, but nothing was said in the summary quoted on pages 59-60 of appellees' brief, or any other portion of the opinion, which sup-



ports the contention now advanced. No reference was made to possession by salvors as a ground for abandonment.

It is urged, as a foundation to the contention sought to be built upon the foregoing decisions, that the possession of the vessel was lost because she was abandoned and a derelict. Technically she was not a derelict, because it was manifest that the master only left the ship at the instance of the crew on account of the shortage of provisions and fresh water, and that upon finally leaving her, the master had no intention of giving the vessel up, for immediately that he reached port on the "*David Evans*", in fact before he got ashore, he reported the position of the "Nottingham" to the tug "Wallula," which immediately rescued her (Ap. pp. 282-4). The master thus clearly indicated a then present intent to repossess himself and his owner of the vessel, by sending the "Wallula" to her assistance. The master retained as much right to possession as did the master of the "William", in *Thornely v. Hebson*, when a volunteer crew from the "Hyder Ali" boarded the "William" and ultimately navigated her to port. In both instances, the intent existed on the part of the master to resume possession upon the salving of the disabled vessel.

Abandonment at sea under the conditions of the present case, then, did not constitute a technical derelict, so as to vest in the salvors an absolute right of possession as against the owner. Right of abandon-



ment is not, therefore, conceded as appellees would have it (brief p. 67).

*The Bee*, Fed. Cas. 1219.

And still further, it is said that the rights acquired by the salvors were such that the owner could not regain possession of the vessel, except upon giving bond. That is true, but no more so than in any case of physical possession by a salvor, whether the vessel be technically a derelict or not. If that were a test of the right to abandon, then in every case of libel for salvage, it would exist, because, upon attachment, the right of possession is diverted until bond is given. Whatever may be the law of England, in this country, possession could have been immediately obtained by a possessory action in admiralty, wherein an appraisalment of the salvaged vessel could have been had, and the bond fixed for the vessel's delivery, and to protect the claims of the salvors. If, before such possessory action was commenced, the vessel was libeled for salvage, then similar appraisalment could have been had under the settled practice of the admiralty courts. It is idle and preposterous, therefore, for appellees to assert (brief pp. 55, 69) that preliminarily the bond would have been fixed in excess of \$34,000. Nor would the court, in any probability, have required a bond to the value of the vessel, as the maximum allowed for the salving of a derelict, save in rare instances of great hazard of life and property, and at proportionately great expense, does not exceed a moiety of the salvaged property.

The fact that the cargo was also libeled for salvage did not affect the case (brief p. 69), because that con-

dition would have existed in any salvage service rendered. If the attachment of the cargo gave the right of abandonment, then such right would exist irrespective either of possession of, or damage to, the vessel. Such a contention, of course, is without merit, and even appellees make no attempt to cite authority to it.

Much is again said of the value of the "Nottingham" in her damaged condition, and of the "danger" of the towage to St. Johns. Both matters have been fully discussed in an earlier portion of this brief.

In point of fact, and of any principle supported by authority, the contention of appellees as to the right of abandonment because of actual abandonment, or possession by the salvors, is not sustained.

But even granting for the decisions cited, all that appellees contend they support, still they do not determine, under the facts of the present case, that a recovery can be had for a constructive total loss because at the time the notice of abandonment was given on Monday, October 16th, the "Nottingham" was in the possession of the salvors.

Appellees have insisted that the Civil Code of California governs the rights and liabilities of the parties, save as they have been modified by the terms and conditions of the policies. *They admit, therefore, that their rights of abandonment are to be determined by sections 2722 and 2723 of the code*, because such provisions are unaffected by anything contained in the policies.

Section 2722 provides:

*“A notice of abandonment must be explicit, and must specify the particular cause of the abandonment, but need state only enough to show that there is probable cause therefor and need not be accompanied with proof of interest or of loss.”*

Section 2723 provides:

*“An abandonment can be sustained only upon the cause specified in the notice thereof.”*

And, in

*Bradlie et al. v. The Maryland Ins. Co.*, 12 Peters  
378; 9 L. ed. 1123, 1132,

the Supreme Court said:

*“In considering the first (instruction), it is material to remark that by all the well settled principles of our law, the state of facts, and not the state of the information at the time of the abandonment, constitutes the true criterion by which we are to ascertain whether a total loss has occurred or not, for which an abandonment can be made.”*  
(Italics ours.)

Adjudged by those determining principles, *appellees gave no notice of abandonment on which recovery for constructive total loss can be grounded because of the actual abandonment of the vessel, or her possession by the salvors.* The notice of Monday, October 16th, recited:

“Seattle, Wash., Oct. 16th, 1911.  
Fireman’s Fund Insurance Company,  
Colman Bldg.,  
Seattle, Wash.

Dear Sirs:

You are hereby notified that we have just received telegram from the Master of the Schooner ‘Wm. Nottingham’, of which the following is a copy:

'Confirm Nelson's telegram "Nottingham" filled October eight lost deckload and masts went by the board October ninth. Abandoned vessel October thirteenth latitude north 46.16, longitude west 125.25 fore and after part of vessel gutted lost all fresh water. Do you authorize me to pay crew?'

In consequence of the damages sustained we hereby abandon to you the schr. 'Wm. Nottingham' and claim for a total loss under the policies issued by you and outstanding upon her.

It will give us great pleasure to give you any information that you may require, or any assistance we can render in order to protect you. At present we are not informed as to the particulars.

Yours truly,

THE GLOBE NAVIGATION COMPANY,

GFT/G.

Per G. F. Thorndyke."

(Ap. 12-13.)

The court will specially note that *no reference is made to possession by the salvors*. The first paragraph gives notice of the receipt of a telegram from the master. Then follows the telegram in which a former telegram sent out by one Nelson is confirmed, and advice is given that the "Nottingham" filled on October 8th, lost her deck load, and masts went by the board on the ninth; that the vessel was abandoned on October 13th in latitude 46° 16' north and longitude 125° 25' west; that the fore and aft parts of the vessel were gutted, and that all fresh water was lost. Inquiry is made as to authority to pay the crew. After thus describing the accident to the vessel, the notice stated that "*in consequence of the damages sustained, we hereby abandon to you the Schr. Wm. Nottingham, and claim for a total loss under the policies insured by you and outstanding upon her.*"



The remaining portion of the notice expressed a willingness to assist appellant; to furnish any information required, but stated that at that time they were not informed as to particulars.

By section 2722 of the code, *the notice is required to be explicit and to specify the particular cause of the abandonment*, and by section 2723, *the abandonment can only be sustained upon the cause specified in the notice*. The provisions are unmistakably clear in their meaning.

*The notice of abandonment given by appellees did not, however, specify possession by the salvors as the cause of abandonment!* Indeed, no reference was made in the notice to the "Nottingham" having been picked up by the salvors, or of being in their possession.

*Abandonment, then, cannot be sustained upon possession by the salvors as a cause of abandonment.* And yet, that is the very contention to which appellees have so strenuously addressed pages 54 to 70 of their brief, for on page 59, they say:

"We insist that when, by perils insured against, the vessel was reasonably and properly abandoned by the crew and became a derelict and was afterwards picked up and brought into Astoria by the salvors and was in their exclusive possession and control, the owner and master being excluded from any participation therein, the salvors asserting a salvage claim in excess of her value, there was a constructive total loss of the vessel at that time irrespective of the extent of damage she had sustained, and that, inasmuch as the owner gave notice of abandonment at that time, the underwriter is liable under this policy."



The contention thus advanced disregards the plain provisions of section 2723, for appellees assert that appellant is liable for a constructive total loss because the "Nottingham", picked up a derelict, was in the exclusive possession and control of the salvors, who were asserting a salvage claim in excess of the value. *Those causes not having been stated in the notice of abandonment, liability for constructive total loss because thereof cannot be held to have existed, unless this court is to ignore the explicit language in which sections 2722 and 2723 of the code are couched.* Such, of course, will not be done, but without it, appellees' contention fails.

The notice of abandonment gave appellant notice of a telegram received from the master, in which reference was made to the "Nottingham" filling, losing her deck-load and masts, of her being abandoned on October 13th, and of her being gutted fore and aft, and losing all the fresh water. It then stated, "*in consequence of the damages sustained we hereby abandon to you the Schr. Wm. Nottingham etc.*" Now, the most that can be said for the notice is that *abandonment was being attempted because of the damages*, and not because of actual abandonment of the vessel at sea. But even if it were given a construction which its plain terms do not justify, and held to include the actual abandonment at sea, the notice was nevertheless ineffective to accomplish an abandonment upon that ground, for on the date the notice was given, the abandoned and derelict, if such it was, condition of the "Nottingham" had ended. She was then safely in Astoria harbor,

having been towed into port on the day before, October the 15th (Ap. p. 285).

The Supreme Court has held, in the excerpt which we have just quoted from *Bradlie v. Ins. Co.*, supra, that *the state of facts, and not the state of the information at the time of abandonment, constitutes the true criterion by which we are to ascertain whether a total loss has occurred or not, for which an abandonment can be made.* Tried by that test, the notice of abandonment was ineffectual to constitute a valid abandonment on the 16th because of the abandonment of the vessel at sea, and her then derelict condition, for she had ceased to be abandoned and derelict prior to the giving of the notice.

*The notice of abandonment, therefore, can only be sustained, if at all, because of the damages suffered.* That is the clear meaning of the notice, and is, in fact, the only ground upon which the action herein was instituted. The thought of anything else as a possible basis for abandonment came afterwards; indeed, after the great bulk of the evidence had been taken. It slightly antedates Thorndyke's "recollection" of the verbal abandonment.

So far, we have only considered the written notice of abandonment, because it was, in truth, the only one ever given. But even if the verbal notice of abandonment had been given, as Thorndyke attempted to describe, it could not sustain a claim for constructive total loss. Bearing in mind that the "Nottingham" was towed in on the 15th, and that the tugs had been sent to her on the morning of the 14th, there is no evidence that at the only time verbal abandonment could have

been made to Taylor on Saturday, to wit, after 9 o'clock at night, the "Nottingham" was not then in tow of the salving tug, and no longer abandoned and derelict. Yet the state of facts, and not the state of information, is the criterion. What the state of fact was at 9 o'clock on Saturday night, the record does not show, because at the time proof was adduced, the afterthought of the verbal abandonment had not occurred. No evidence was subsequently taken upon it by appellees. The evidence on this point, therefore, will not sustain the contention of appellees.

That the abandonment was intended, as stated in the notice, "in consequence of the damages sustained," is established by the testimony of Thorndyke, who admitted that the purpose of taking the "Nottingham" to the St. Johns drydock was to ascertain whether she was a total loss under the policies (Ap. pp. 370-1).

By whatever test, then, the contention of appellees is tried, it fails. Under the facts, the right to abandon did not exist. In point of principle the contention is not supported by the cases cited. And adjudged by the governing statutory requirements of a notice of abandonment, the right to abandon can alone be grounded upon the damages to the "Nottingham", the cost of repairing which was not sufficient to give appellees the right under clause 9 of the policies.

**High Probability Rule Inapplicable Under Policy  
Conditions. But if Applied, Still Constructive  
Total Loss Did Not Exist.**

The so-called "high-probability" rule, which finds expression in a number of cases under the general Ameri-

can law, is invoked to support the abandonment. In none of these decisions, however, were policies of the form here in suit construed. But that such principle of abandonment exists under the general American law, is not to be denied, for such was the holding in *Peele v. Ins. Co.*, supra, and in *Bradlie v. Ins. Co.*, supra. The doctrine was also enunciated in

*Orient Ins. Co. v. Adams*, 123 U. S. 67; 31  
L. ed. 63,

but it will be observed, in that case, that the policy expressly provided that

“in no case whatever shall the assured have the right to abandon until it shall be ascertained that the recovery and repairs of the said vessel are impracticable. \* \* \* ”

Thus the rule had special application there, for the practicability of the recovery and repairs was necessarily to be tested by their “high probability,” as there is in “impracticability” the same principle “of wanting in certainty” as constitutes the foundation for the high probability rule.

The case of

*Royal Exchange Assur. v. Graham & Morton Trans. Co.*, 166 Fed. 32,

is an authority in support of the application of the high probability rule to a policy, the terms of which stipulated that the right of abandonment should not exist, unless the loss exceeded one-half the value of the hull and machinery, as stated in the policy. In point of principle, the decision would seem to be applicable



to a policy such as is now before the court, stipulating, as does clause 9, that

“the insured shall not have the right to abandon the vessel unless the amount which the company would be liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) shall exceed half the amount hereby insured.”

But Mr. Justice Mathews, Circuit Justice of the Circuit Court for the Sixth Circuit, in

*Wallace v. Thames & Mersey Ins. Co.*, 22 Fed. 66, after a review of the general American law, held to the contrary, in passing upon a policy almost identical in terms with the policies here in suit, save that the present policies exclude salvage and general average expenses and the cost of funds. Of it, the court said:

“A comparison with this state of the law, of the special stipulations of the policy, will show clearly the changes in the rights and obligations of the parties intended to be introduced by their contract. They are as follows:

“First. *The right of abandonment is made to depend upon the result, and not upon a calculation of probabilities.* No right to abandon is admitted when the loss is not strictly and technically an actual total loss, unless, as it turns out, the expense of restoration exceeds one-half the value.

“Second. The cost of repairs is to be adjusted for the purpose of determining such excess as if the loss were admitted to be partial; that is, by deducting one-third new for old. The language is that ‘the assured shall not have the right to abandon the vessel in any case unless the amount which



the insurers would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured'."

To the same effect is

*Hall v. Franklin Ins. Co.*, 9 Pick. 466.

Thus, the question as to whether the doctrine of "high probability" is applicable to the present policies remains, we submit, without settled determination. But that condition of the law does not affect the result in the case at bar, because, even if tried by the rule, *the facts do not show a high probability of the existence of conditions which would have given appellees the right to abandon.*

If so tested, the question would have been as to whether, at the time of abandonment, there was a "high probability" that the amount which appellant would have been liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds) would have exceeded half the amount insured, viz., \$15,000. *The facts show that there was no "high probability" that such partial loss liability would have been in excess of \$15,000, nor anywhere near that amount.*

Based upon the actual cost for which the "Nottingham" could have been repaired and restored to her former condition, the amount which appellant would have been liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds), would have amounted, as we have previously pointed out, to \$9540.66, or \$5459.34 less than the

*required liability. Instead, then, of there being a "high probability", the facts show that the liability would have been less than two-thirds of the required amount.*

But granting, for sake of argument, any concession to which claim has been made by appellees because of any doubt as to the cost of repair, still, as we have already shown, the amount which appellant would have been liable to pay under such an adjustment, as of partial loss for labor and materials, would only have been \$11,037.02, *or \$3962.98 less than the amount necessary to have given appellees the right to abandon.*

There was not, then, a high probability, or any probability, that the amount which appellant would have been liable to pay under an adjustment, as of partial loss for labor and materials (exclusive of salvage or general average expenses and the cost of funds), would have exceeded half the amount insured. No one so testified for appellees; in fact, no witnesses called in the case were interrogated upon the point, as they were in *Royal Exchange Assur. v. Graham & Morton Trans. Co.*, supra. The record is barren, then, of any evidence which would lend support to a successful application of the doctrine of "high probability". Neither the original complaint, nor the amended complaint alleged such "high probability", and, indeed, was not drawn upon that theory of loss. *It did not, in fact, exist.*

In all of the circumstances of the case, therefore, we respectfully submit that the evidence does not show

the right to recover for a constructive total loss under the terms and conditions of the policies, and by them are the rights of the parties governed.

*Soelberg v. Western Assur. Co.*, supra.

We renew the prayer of our opening brief for relief, and will ever pray, etc.

Dated, San Francisco,

December 27, 1915.

Respectfully submitted,

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

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*Proctors for Appellant.*



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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ROBERT WYLLIE DAVIS,  
Plaintiff in Error,  
vs.  
FRED HARRISON,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the Supreme Court of the  
Territory of Hawaii.

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Filed

APR 10 1908

F. D. McCallister,  
Clerk.





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the Supreme Court of the Territory of Hawaii.*

October, 1914, Term.

(Stamped \$2.00.)

FRED HARRISON,

Plaintiff-Defendant in Error,

vs.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error.

**Petition for a Writ of Error.**

To the Honorable the Supreme Court of the Territory of Hawaii:

Your petitioner, Robert Wyllie Davis, the above-named defendant-plaintiff in error, respectfully shows and presents:

1. That in a certain action lately pending in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, wherein this plaintiff in error was defendant, and the above-named defendant in error was plaintiff, filed and docketed in said First Circuit Court as Law No. 7783, a decision was, on the 25th day of June, A. D. 1914, rendered and filed by the Court (jury waived) finding for the defendant in error (plaintiff in said action) and against the defendant (plaintiff in error and petitioner herein) for an undivided one-half interest in the term of years the subject of said action, and judgment thereon was by the Court on the 26th day of June, A. D. 1914, entered and filed in favor of said defendant in error, the plaintiff in said action, said

judgment being in effect that said plaintiff therein was the owner and entitled to the immediate possession of an undivided one-half for a term of years, [1\*] to wit, until June 1st, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu, Territory of Hawaii, known as the land of Mokapu, and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the registrar of conveyances, in said Honolulu, in Book 343, at pages 347-351, and that said plaintiff's title and ownership in said undivided one-half interest in said term of years be accordingly quieted and confirmed, and that plaintiff recover his costs taxed in the sum of \$41.75.

2. That your petitioner deems himself aggrieved by said decision and judgment.

3. That your petitioner is advised and believes that there is and manifest error was committed by said Court in said action, as is shown by the assignment of errors filed herewith.

4. That execution on said judgment has not been fully satisfied.

WHEREFORE, plaintiff in error and petitioner herein prays that a writ of error may issue from this Honorable Court to the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, commanding the clerk of said court to certify up to this Honorable Supreme Court the record in said above-mentioned action, including the complaint and exhibit "A" thereto attached filed June 12, 1913, and

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\*Page-number appearing at top of page of original certified Record.

term summons, answer of defendant and demand for jury trial filed July 1, 1913, answer of defendant and demand for jury trial filed July 2, 1913, motion to reopen plaintiff's case for further evidence and notice of motion filed November 15, 1913, decision on motion for nonsuit filed by Honorable W. L. Whitney, December 22, 1913, plaintiff's exception to decision filed December 23, 1913, judgment [2] filed January 2, 1914, exception to judgment filed January 2, 1914, notice of decision on exception filed March 7, 1914, motion to set for further hearing and notice filed March 12, 1914, decision of W. L. Whitney, Second Judge, filed June 25, 1914, judgment filed June 26, 1914, exception to decision, exception to judgment, Plaintiff's Exhibit "A," lease and assignments John K. Sumner by trustee to A. V. Gear, recorded in liber 343, page 347, Plaintiff's Exhibit "C," assignment of leases by Addie B. Gear to Fred Harrison, dated June 6, 1913, Plaintiff's Exhibit "D," quitclaim deed by Cecil Brown to Fred Harrison, dated June 9, 1913, Plaintiff's Exhibit "E," assignment of lease by A. V. Gear to R. W. Davis, dated June 16, 1913, Defendant's Exhibit 1, assignment of leases by Fred Harrison to Addie B. Gear, dated October, 24 1910, Defendant's Exhibit 2, assignment of leases by A. V. Gear to Fred Harrison, dated November 16, 1910, all other exhibits not herein specifically mentioned, also, all the record, pleadings and exhibits in the following cases, viz.: Equity No. 1293, entitled "First Circuit Court, In the Matter of the Trust Deed of John K.



Sumner," Equity No. 1814, entitled "First Circuit Court, Fred Harrison v. A. V. Gear and Addie B. Gear, his wife," Equity No. 1828, entitled "First Circuit Court, Cecil Brown, Trustee, v. Robert Wyllie Davis," Law No. 7695, entitled "First Circuit Court, Cecil Brown, Trustee, v. Robert Wyllie Davis," and defendant's bill of exceptions on, to wit, the 6th day of November, A. D. 1914, settled and allowed by the Presiding Judge, the Honorable W. L. Whitney, together with an authenticated transcript of the evidence taken upon the trial of said cause, that the errors therein, if any, may be corrected according to law.

Dated this 11th day of November, A. D. 1914.

ROBERT W. DAVIS,

Defendant-Plaintiff in Error.

E. C. PETERS,

Attorney for Defendant-Plaintiff in Error. [3]

City and County of Honolulu,  
Territory of Hawaii,—ss.

Robert Wyllie Davis, being first duly sworn, on oath deposes and says: That he is the defendant-plaintiff in error in the foregoing petition for a writ of error named; that he has read said petition for a writ of error and knows the contents thereof, and that the matters therein stated are true of his own knowledge, except those things which are therein stated and alleged upon information, advice or belief and as to those matters so alleged he believes them to be true.

ROBERT W. DAVIS.

Subscribed and sworn to before me this 11th day of November, A. D. 1914.

[Seal] HILDA SMITH,  
Notary Public 1st Judicial Circuit, Territory of  
Hawaii.

[Endorsed]: Rec'd \$26.00. Filed November 11, 1914, at 2:42 P. M. J. A. Thompson, Clerk. [4]

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*In the Supreme Court of the Territory of Hawaii.*  
October, 1914, Term.

FRED HARRISON,  
Plaintiff-Defendant in Error,

vs.

ROBERT WYLLIE DAVIS,  
Defendant-Plaintiff in Error.

**Assignment of Errors.**

Comes now Robert Wyllie Davis, the above-named defendant-plaintiff in error and petitioner herein, and says, that in the record, opinion and decision, judgment and proceedings had in a suit lately pending in the Circuit Court of the First Judicial Circuit, the same being an action to quiet title, wherein your petitioner was and is defendant, and Fred Harrison was and is plaintiff, there is manifest, material and prejudicial error, and petitioner herein now makes, files and presents the following assignment of errors upon which he relies as follows, to wit:

1. That the Court erred in admitting over the objection of defendant the consolidated certified copies of the lease dated June 1, 1910, from John D.

Holt, trustee, to A. V. Gear, of the land of "Mokapu" (described in the trust deed from John K. Sumner to Bruce Cartwright, trustee, dated August 16, 1892, and on August 17, 1892, recorded in the office of the Registrar of Conveyances of the Territory of Hawaii in liber 136, at pages 136-137), of the undated consent thereto by Robert Wyllie Davis, and of the mesne assignments thereof by said A. V. Gear to [5] Charles E. Peterson dated October 12, 1910, from the latter to Addie B. Gear dated October 12, 1910, and from Addie B. Gear to the plaintiff Fred Harrison dated October 21, 1910. Said lease, consent and mesne assignments were recorded in the said registry office on May 6, 1911, in liber 343, at pages 347 et seq.

The offer was objected to by defendant as incompetent, irrelevant and immaterial, and not tending to prove any of the issues in the case, and on the further ground that said Holt named as trustee was not a trustee, but a pretended or fictitious trustee, and that he had no authority in law to give such a lease. (See page 2, bill of exceptions.)

2. That the Court erred in sustaining the objection of plaintiff thereto and refusing to permit the question propounded by defendant to the plaintiff while a witness on his own behalf on cross-examination, whether he (said plaintiff) were the same person named as mortgagee in a purported mortgage given by A. V. Gear to one Fred Harrison dated November 16, 1910, and upon which the proceedings in Equity Case No. 1814 were predicated.

Plaintiff's objection was that it was not proper cross-examination. (See page 3, bill of exceptions.)

3. That the Court erred in sustaining the objection of plaintiff thereto and refusing to permit the question propounded by defendant to plaintiff on cross-examination concerning his, said plaintiff's identity with the mortgagee named in a certain chattel mortgage from Addie B. Gear to one Fred Harrison, dated June 9, 1911, connected with the certain foreclosure proceedings brought by the said Fred Harrison against A. V. Gear and Addie B. Gear, his wife, No. 1814 Equity Division, and recorded in liber 351, at page 121, the said [6] question being as follows:

Q. I want to call your attention to another document connected with this Equity Case 1814, dated the 9th day of June, 1911, and recorded in liber 351, page 121, between A. V. Gear and wife and Fred Harrison named in that particular document.

Plaintiff's objection to the question was that it was not proper cross-examination.

4. That the Court erred in sustaining the objection of plaintiff to and refusing to permit the question propounded by defendant to plaintiff on cross-examination touching the identity of plaintiff with one Fred Harrison named as grantee in the certain deed from one Cecil Brown dated February 29, 1912, and recorded in said registrar's office in liber 366, at page 140.

Plaintiff objected to the question on the ground that it was not proper cross-examination.



5. That the court erred in permitting over the objection of defendant the question propounded to the plaintiff on redirect examination as follows:

Q. I will ask you whether or not the notes referred to in exhibit 1, for which the security assignment was purported to be made,—whether or not those notes were paid by A. V. Gear?

The objection of defendant to the question was that it was not proper redirect examination.

6. That the Court erred in permitting over the objection of defendant the question propounded plaintiff on redirect examination concerning the witness's connection with the signature appended to a certain purported assignment from Addie B. Gear to the witness, dated June 6, 1913. [7]

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in the case.

7. That the Court erred in overruling defendant's objection to and admitting in evidence upon offer of plaintiff a certain purported agreement between Addie B. Gear and Fred Harrison dated June 6, 1913.

This instrument was admitted as Plaintiff's Exhibit "C."

Defendant's objection to the offer was that it was incompetent, irrelevant and immaterial.

8. That the Court erred in overruling defendant's objection to and admitting in evidence upon offer of plaintiff a deed from Cecil Brown, trustee, to Fred Harrison, dated June 9, 1913, the record in Equity



Case No. 1293, and the lease from John D. Holt, trustee, to A. V. Gear dated June 1, 1910, and an assignment of lease from A. V. Gear to Robert W. Davis dated June 16, 1910.

The defendant's objection to the offer was that it was incompetent, irrelevant and immaterial.

9. That the Court erred in overruling defendant's objection to and admitting in evidence upon the offer of plaintiff an assignment of A. V. Gear to Robert W. Davis, the defendant, dated June 16, 1910, of an undivided one-half interest in and to of his lease of Mokapu.

Defendant's objection to this offer was that it was incompetent, irrelevant and immaterial and did not prove or tend to prove any of the issues in the case.

The instrument was admitted as Plaintiff's Exhibit "E."

10-16. That the Court erred in overruling defendant's motion for a nonsuit, which was upon the following grounds:

(1) That the plaintiff had failed to show, nor was [8] there any evidence tending to show, that the plaintiff was entitled to an undivided half for a term of years until June, 1935, of the land of Mokapu, as set forth in paragraph one of the complaint.

(2) That the plaintiff had failed to show and there was no evidence, either competent or otherwise, tending to show that he had any interest in the land known as Mokapu aforesaid.

(3) That the alleged and pretended appointment of one John D. Holt, or John D. Holt, Jr., by a judge of the Circuit Court of the First Circuit, was null

and void, in this, that the Circuit Court was without jurisdiction to make such appointment; and

(4) That it affirmatively appeared from the evidence that at the time of the execution of the alleged lease to the plaintiff, the defendant was possessed of a life estate in the land so referred to as "Mokapu," free and clear from any and all trusts.

11. That the Court erred in overruling defendant's objection to and admitting in evidence upon plaintiff's offer, the record and files in Case No. 1828, Equity Division of the Circuit Court of the First Circuit.

Defendant's objection to the offer was that it was incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case.

12. That the Court erred in overruling the objection of defendant to and permitting the following question to be propounded by plaintiff's counsel to plaintiff who had been recalled as a witness on his own behalf:

Q. I will ask you this. In this foreclosure proceeding when the time came for a sale to be made, a commissioner's [9] sale under order of the Court, who bought in whatever interests were foreclosed in this proceeding?

Defendant's objection was that the question was incompetent, irrelevant and immaterial.

13. That the Court erred in overruling the objection of defendant to and permitting to be propounded to plaintiff by his counsel (recalled as a wit-

ness on his own behalf) the following question:

Q. I show you Law No. 7695 of the files of this Circuit Court, Cecil Brown, Trustee, v. Robert Wyllie Davis, and will ask you if that is the suit brought at your instigation to quiet title?

Defendant's objection was that the question was immaterial.

14. That the Court erred in overruling the objection of defendant on the ground of immateriality and admitting in evidence upon the offer of plaintiff, the record and files of Law No. 7695 of the Circuit Court of the First Judicial Circuit.

15. That the Court erred in overruling the objection of defendant on the ground of immateriality and permitting plaintiff's counsel to propound to the plaintiff who was recalled for further examination, the following question:

Q. In this case, Mr. Harrison, the record shows that on the 27th day of June, 1913, judgment was given for the defendant upon the ground that the plaintiff had asked for a nonsuit in the case. When the nonsuit was granted, what, if anything, further did you do?

17. That the Court erred in sustaining the objection of plaintiff to and rejecting the evidence offered by defendant of a deed from Robert Wyllie Davis and wife to John K. Sumner of an undivided one-half interest in the land known as "Mokapu," [10] dated January 1, 1906, and recorded on March 4, 1908, in liber 302, on page 192.

Plaintiff's objection was that it was incompetent,

irrelevant and immaterial and defendant was estopped from introducing any such deed in evidence.

18. That the Court erred in sustaining the objection of plaintiff to and rejecting the offer of defendant of a certain mortgage from Robert Wyllie Davis and wife to John K. Sumner, dated January 2, 1906, and recorded on March 4, 1908, in the office of the registrar of conveyances of the Territory of Hawaii, in liber 303, at page 91, whereby the said Robert W. Davis conveyed by way of mortgage to the said John K. Sumner an undivided one-half interest in and to the land of Mokapu.

Plaintiff's objection was that this evidence was incompetent, irrelevant and immaterial, and that defendant was estopped from introducing such mortgage in evidence.

19. That the Court erred in sustaining the objection of plaintiff to and refusing to permit the following question propounded by defendant to the defendant Robert Wyllie Davis, while a witness on his own behalf in defense:

Q. You are named the mortgagor in a certain mortgage from yourself and wife to John K. Sumner, dated the 2d day of January, 1906, recorded in liber 303, at page 91. I will ask you whether or not you have ever paid up the amount secured by that mortgage?

Plaintiff's objection was that the question was incompetent, irrelevant and immaterial, and the defendant was estopped from introducing any such papers in evidence.

20. That the Court erred in overruling the objec-



tion of defendant to and permitting the following question propounded [11] by plaintiff to A. V. Gear, called as a witness by plaintiff in rebuttal:

Q. Were you still working under the agreement with Wylie Davis at the time you took this 25-year leasehold? (Tr. II, p. 27.)

Defendant's objection was that the question was incompetent, irrelevant and immaterial.

21. That the Court erred in denying defendant's motion to strike out the answer of the witness A. V. Gear given on direct examination on rebuttal, as follows:

A. The agreement was cancelled coextensively with the issuing of the 25-year lease. There were two agreements that I had with Mr. Davis that I was working under, and the consideration of the execution of the lease was the cancelling of the agreements,—the terms of—

The ground of defendant's motion was that it appeared that the witness was testifying in respect to two agreements, the contents of which were unknown.

22. That the Court erred in overruling the objection of defendant to the question propounded by plaintiff to the witness A. V. Gear on direct examination in rebuttal, as follows:

Q. And these agreements you have spoken of were entered into between yourself and Mr. Davis. Were you, Mr. Gear, ever present at any conversation between Wallie Davis and Sumner when the matter of Davis' deeding over his in-



terest to Sumner was discussed? (Tr. II, p. 27.)

Defendant's objection was on the ground that there were not any agreements in evidence and the time laid was indefinite.

23. That the Court erred in overruling the defendant's [12] objection to the following question propounded to the witness A. V. Gear on direct examination:

Q. I will change that by saying, state what was discussed by Sumner and Davis in regard to the ownership of Mokapu.

Defendant's objection to this question was that it was irrelevant, incompetent and immaterial, not tending to prove or disprove any of the issues of the case and calling for a conclusion of the witness.

24. That the Court erred in overruling the objection of defendant to and permitting plaintiff to propound the following question on direct examination of the witness A. V. Gear who had been called on rebuttal:

Q. Just answer "Yes" or "No" to this question. Did you ever know from Wallie Davis' own lips, his own statement, as to the real intent and meaning of this deed of January 1, 1906, of one-half of Mokapu to John K. Sumner, a deed absolute on its face?

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial and indefinite.

25. That the Court erred in overruling the ob-

jection of defendant to and permitting plaintiff to propound the following question to the witness Gear on direct examination while called in rebuttal:

Q. Will you state what that statement was?

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case.

26. That the Court erred in overruling the objection of defendant to and permitting plaintiff to propound to the witness Gear on cross-examination when called in rebuttal, the [13] following question:

Q. Let me ask you, Mr. Gere, did Mr. Davis at this interview you have spoken of when he spoke of giving Mokapu as security, did he mention anything about the amount of the advances which he had secured?

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial.

27. That the Court erred in overruling the objection of defendant to and permitting the plaintiff to propound to the witness Gear on direct examination on rebuttal, the following question:

Q. There is on record here in evidence, Mr. Gere, a sublease, or, rather, an assignment by you of one-half of your interest in and to this 25-year term to Wallie Davis after you took the assignment. I want to ask you whether or not the matter of that assignment of this one-half interest was ever discussed between yourself and

Mr. Davis and Mr. Sumner, prior to the time when the 25-year term was created in 1910?

Defendant's objection was that the question was incompetent, irrelevant and immaterial.

28. That the Court erred in granting over the objection of defendant plaintiff's motion to amend the prayer of his complaint to read as follows:

"Wherefore, plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term thereof, unless sooner disposed of by judicial authority; that the defendant may be required to set up in the traverse any claim he may have in and to the undivided half of said term of years in said land; that defendant be forever barred from any claim to and of interest in said described undivided half of said term of years and that said undivided half of [14] said term of years may be quieted and that the plaintiff's ownership therein may be confirmed and the plaintiff herein awarded his costs herein."

Defendant's objection was that the motion was made too late.

29. That the Court erred in finding for the plaintiff for an undivided half of the term of years set out in the complaint, said finding being against the law and the evidence and the weight of the evidence.

30. That the Court erred in not finding and deciding that the plaintiff was not entitled to any interest whatsoever in the land known as Mokapu.

31. That the Court erred in entering its judgment herein adjudging that the plaintiff was the owner and

entitled to the immediate possession of an undivided one-half for a term of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu, Territory of Hawaii, known as the land of Mokapu, and described in that certain lease from John D. Holt, trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the registrar of conveyances in said Honolulu, in liber 343, at pages 347-351, upon the ground that said judgment is contrary to the law and the evidence and the weight of the evidence.

32. That the Court erred in adjudging that the plaintiff was entitled to any interest in the land known as Mokapu.

33. That the Court erred in not entering its judgment herein that plaintiff take nothing by his said action.

Dated this 11th day of November, A. D. 1914.

ROBERT W. DAVIS,  
Defendant-Plaintiff in Error.

E. C. PETERS,  
Attorney for Plaintiff in Error.

[Endorsed]: Filed November 11, 1914, at 2:42  
P. M. J. A. Thompson, Clerk. [15]

---

*In the Supreme Court of the Territory of Hawaii.*  
October, 1914, Term.

FRED HARRISON,  
Plaintiff-Defendant in Error,

vs.

ROBERT WYLLIE DAVIS,  
Defendant-Plaintiff in Error.



**Notice [of Issuance of Writ of Error Returnable in  
Supreme Court, Territory of Hawaii].**

To the Above-named Plaintiff-Defendant in Error,  
and Messrs. Thompson, Wilder, Watson &  
Lymer, His Attorneys:

You and each of you will please take notice that a  
Writ of Error has issued from the Supreme Court  
of the Territory of Hawaii to the Circuit Court of  
the First Judicial Circuit of said Territory, in the  
action lately pending therein, in which you, the said  
Fred Harrison, were plaintiff, and the undersigned  
Robert Wyllie Davis, was defendant, numbered and  
docketed in said court as Law No. 7783.

Dated this 11th day of November, A. D. 1914.

ROBERT W. DAVIS,  
Defendant-Plaintiff in Error.

E. C. PETERS,  
Attorney for Plaintiff in Error.

[Endorsed]: Filed November 11, 1914, at 2:42  
P. M. J. A. Thompson, Clerk. [16]

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*In the Supreme Court of the Territory of Hawaii.*  
(Stamped \$2.00.)

FRED HARRISON,  
Plaintiff-Defendant in Error,

v.

ROBERT WYLLIE DAVIS,  
Defendant-Plaintiff in Error.



**Summons [on Return to Writ of Error in Supreme Court, Territory of Hawaii].**

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy:

You are commanded to summon Fred Harrison, plaintiff-defendant in error, above named, to appear before the Supreme Court of the Territory of Hawaii within twenty (20) days after service hereof, to answer the annexed petition for a writ of error, etc., of Robert Wyllie Davis, defendant-plaintiff in error above-named.

And have you *then there* this writ with full return of your doings thereon.

WITNESS the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii, at Honolulu, city and county of Honolulu, this 11th day of November, A. D. 1914.

[Seal]

J. A. THOMPSON,

Clerk. [17]

Served the within Summons on Fred Harrison, therein named as plaintiff-defendant in error, at Honolulu, city and county of Honolulu, Territory of Hawaii, this 12th day of November, A. D. 1914, by delivering to him a certified copy hereof and of the Petition for a Writ of Error, Assignment of Errors, and Notice annexed hereto and at the same time showing him the original Petition for a Writ of Error, Assignment of Errors, Notice and Summons.

Dated Honolulu, city and county of Honolulu, Territory of Hawaii, this 12th day of November, A. D. 1914.

W. P. JARRETT,  
High Sheriff, Territory of Hawaii.

[Endorsed]: No. 814. Supreme Court, Territory of Hawaii. Fred Harrison, Plaintiff-Defendant in error, v. Robert W. Davis, Defendant-Plaintiff in Error. Summons. Issued at 2:45 o'clock, P. M. November 11, 1914. J. A. Thompson, Clerk. Returned at 1:40 o'clock P. M. November 12, 1914. J. A. Thompson, Clerk.

Received at 3:56 P. M. Nov. 11, A. D. 1914.

P. GLEASON,  
Deputy High Sheriff.

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*In the Supreme Court of the Territory of Hawaii.*

October, 1914, Term.

(\$1 Stamp.)

FRED HARRISON,  
Plaintiff-Defendant in Error,  
vs.

ROBERT WYLLIE DAVIS,  
Defendant-Plaintiff in Error.

**Bond [on Writ of Error Returnable in Supreme Court, Territory of Hawaii].**

KNOW ALL MEN BY THESE PRESENTS:  
That we, Robert Wyllie Davis, of Honolulu, city and county of Honolulu, Territory of Hawaii, as principal, and Hilda Smith of the same place, as surety,

are held and firmly bound unto Fred Harrison, his heirs, executors, administrators and assigns, in the penal sum of \$100, the payment of which well and truly to be made unto the said Fred Harrison, his heirs, executors, administrators or assigns, we do hereby bind ourselves, our and each of our respective heirs, executors and administrators, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, THAT:

WHEREAS, upon the date hereof, the above-named plaintiff in error filed his petition for a writ of error in the Supreme Court of the Territory of Hawaii, directed to the clerk of the Circuit Court of the First Judicial Circuit of said Territory, commanding him to forthwith send up to said Supreme Court the record, including all pleadings, motions, exhibits, bills of exceptions filed in, and a certified transcript of the evidence taken and other proceedings had upon the trial of the certain [18] action in said court lately pending, wherein the above-named defendant in error was plaintiff, and the above-named plaintiff in error was defendant, filed and docketed in said First Circuit Court as Law No. 7783.

NOW, THEREFORE, shall the above-named plaintiff in error fail to sustain his Writ of Error and shall pay, in case thereof, the judgment in said original cause, then this obligation is to be null and void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said above-

bounden principal and surety have hereunto set their hands and seals, this 11th day of November, A. D. 1914.

ROBERT W. DAVIS, (Seal)  
Principal.  
HILDA SMITH, (Seal)  
Surety.

APPROVED as to amount and sufficiency of surety, this 11th day of November, A. D. 1914.

WM. L. WHITNEY,  
Judge Presiding 1st Circuit Court.

[Endorsed]: No. 814. Supreme Court, Territory of Hawaii. Fred Harrison, Plaintiff-Defendant in Error, vs. Robert W. Davis, Defendant-Plaintiff in Error. Bond. Filed November 11, 1914, at 2:42 P. M. J. A. Thompson, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Plff. in Error. [19]

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*In the Supreme Court of the Territory of Hawaii.*

October Term, 1914.

(Stamped \$2.00.)

FRED HARRISON,  
Plaintiff-Defendant in Error,  
vs.

ROBERT WYLLIE DAVIS,  
Defendant-Plaintiff in Error.



**Writ of Error [Returnable in Supreme Court,  
Territory of Hawaii].**

The Territory of Hawaii: To John Marcallino, Esquire, Clerk Circuit Court, First Circuit.

WHEREAS, in an action lately pending before the Circuit Court of the First Circuit, in which the said Fred Harrison was plaintiff, and the said Robert Wyllie Davis was defendant, error is alleged to have occurred as appears by the assignment of errors on file in this court, you are commanded forthwith to send up to this court the record and the exhibits filed in said proceedings, including the complaint and exhibit "A" thereto attached filed June 12, 1913, and term summons, answer of defendant and demand for jury trial filed July 1, 1913, answer of defendant and demand for jury trial filed July 2, 1913, motion to reopen plaintiff's case for further evidence and notice of motion filed November 15, 1913, decision on motion for nonsuit filed by Honorable W. L. Whitney December 22, 1913, plaintiff's exception to decision filed December 23, 1913, judgment filed January 2, 1914, exception to judgment filed January 2, 1914, notice of decision on exceptions filed March 7, 1914, motion to set for [20] further hearing and notice filed March 12, 1914, decision of W. L. Whitney, Second Judge, filed June 25, 1914, judgment filed June 26, 1914, exception to decision, exception to judgment, Plaintiff's Exhibit "A," lease and assignments John K. Sumner by Trustee to A. V. Gear, recorded in liber 343, page 347, Plaintiff's Exhibit "C," assignment of leases by Addie B. Gear



to Fred Harrison, dated June 6, 1913, Plaintiff's Exhibit "D," quitclaim deed by Cecil Brown to Fred Harrison, dated June 9, 1913, Plaintiff's Exhibit "E," assignment of lease by A. V. Gear to R. W. Davis, dated June 16, 1913, Defendant's Exhibit 1, assignment of leases by Fred Harrison to Addie B. Gear, dated October 24, 1910, Defendant's Exhibit 2, assignment of leases by A. V. Gear to Fred Harrison, dated November 16, 1910, all other exhibits not herein specifically mentioned, also, all the record, pleadings and exhibits in the following cases, viz: Equity No. 1293, entitled "First Circuit Court In the Matter of the Trust Deed of John K. Sumner," Equity No. 1814, entitled "First Circuit Court, Fred Harrison v. A. V. Gear and Addie B. Gear, his wife," Equity No. 1828, entitled "First Circuit Court," Cecil Brown, Trustee, v. Robert Wyllie Davis," Law No. 7695, entitled "First Circuit Court, Cecil Brown, Trustee, v. Robert Wyllie Davis," and defendant's bill of exceptions on to wit, the 6th day of November, A. D. 1914, settled and allowed by the Presiding Judge, the Honorable W. L. Whitney, together with an authenticated transcript of the evidence taken upon the trial of said cause.

WITNESS, the Honorable A. G. M. ROBERTSON, Chief Justice of the Supreme Court, at Honolulu, Territory of Hawaii, [21] this 11th day of November, A. D. 1914.

By the COURT.

[Seal]

J. A. THOMPSON,  
Clerk Supreme Court.

Received the foregoing Writ of Error on this 11th day of November, 1914, at 3 o'clock P. M.

JOHN MARCALLINO,  
Clerk Circuit Court 1st Circuit.

In obedience to the within writ to me directed I herewith send up the record and all the exhibits filed in said above mentioned cause.

JOHN MARCALLINO,  
Clerk Circuit Court First Circuit.

Dated this 28th day of November, A. D. 1914.

[Endorsed]: No. 814. Supreme Court Territory of Hawaii. Fred Harrison, Plaintiff-Defendant in Error, vs. Robert W. Davis, Defendant-Plaintiff in Error. Writ of Error. Filed and Issued November 11, 1914, at 2:45 P. M. J. A. Thompson, Clerk. Returned November 28, 1914, at 9:45 A. M. J. A. Thompson, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Plff. in Error. [22]

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*In the Supreme Court of the Territory of Hawaii.*  
October, 1914, Term.

WRIT OF ERROR.

FRED HARRISON,  
Plaintiff-Defendant in Error,

vs.

ROBERT WYLLIE DAVIS,  
Defendant-Plaintiff in Error.

**Appearance of Counsel for Defendant in Error [in  
Supreme Court, Territory of Hawaii].**

The clerk of the above-entitled court will enter

the appearance of the undersigned as counsel for plaintiff-defendant in error in the above-entitled cause.

THOMPSON, WILDER, MILVERTON &  
LYMER,

W. B. L.,

Attorneys for Plaintiff-Defendant in Error.

Dated at Honolulu, this 13th day of November,  
A. D. 1914.

[Endorsed]: No. 814. Supreme Court of the Territory of Hawaii. Fred Harrison vs. Robert Wyllie Davis. Appearance. Filed November 13, 1914, at 4:00 P. M. Robert Parker, Jr., Assistant Clerk. Thompson, Wilder, Milverton & Lymer, 2-11 Campbell Block, Honolulu, Attorneys for Plaintiff-Defendant in Error. [23]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January Term, 1913.

\$2.00 Stamps.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Complaint.**

To the Honorable Presiding Judge of the Circuit  
Court of the First Circuit:

The undersigned, Fred Harrison, of the city and

county of Honolulu, Territory of Hawaii, plaintiff herein, complains of Robert Wyllie Davis, of said city and county of Honolulu, defendant herein, and for cause of action alleges:

1. That the plaintiff is entitled to one undivided half for a term of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu aforesaid, known as the land of Mokapu, and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the registrar of conveyances in said Honolulu in book 343, pages 347-251, a copy of which lease is hereto attached and made a part hereof marked exhibit "A."

2. That defendant claims said undivided one-half of said land adversely to plaintiff, and plaintiff is desirous of having the title thereto adjudicated and quieted. [24]

3. That defendant is a necessary party to the complete determination and settlement of the question of title involved herein.

WHEREFORE, the plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term hereof, unless sooner disposed of by judicial authority; that defendant may be required to set up any adverse claim which he may have in and to said undivided half of said land; and for costs.



Dated Honolulu, June 12, 1913.

(Signed) FRED HARRISON,  
Plaintiff.

THOMPSON WILDER, WATSON & LYMER,  
(Signed) W. B. L.,  
Attorneys for Plaintiff.

Territory of Hawaii,

City and County of Honolulu,—ss.

Fred Harrison, being duly sworn, deposes and says that he is the plaintiff above named; that he has read the foregoing complaint and that the same is true.

(Signed) FRED HARRISON.

Subscribed and sworn to before me this 12<sup>th</sup> day of June, A. D. 1913.

[Seal] (Signed) J. R. KINNY,  
Notary Public, First Judicial Circuit, Territory of Hawaii. [25]

**Exhibit "A" [to Complaint].**

THIS INDENTURE of Lease made this 1st day of June, A. D. 1910, between John D. Holt, Trustee, of Honolulu, City and County of Honolulu, Territory of Hawaii, lessor, and A. V. Gear of the same place, lessee.

WHEREAS, on the 16th day of August, 1892, by a certain deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313, 314, John K. Sumner of the City and County of Honolulu, Territory of Hawaii, conveyed unto Bruce Cartwright of the same place, certain land situated at Koolaupoko, Island of Oahu, known as the land of Mokapu, in



trust, nevertheless, among other things, to pay the rents, issues and profits arising from or out of said land as directed in said deed of trust.

AND WHEREAS, the said John D. Holt was duly appointed and substituted to act as trustee in said deed of trust, in the place and stead of the said Bruce Cartwright and at the instance of the said Bruce Cartwright by an order of a Judge of the First Circuit Court of the said Territory of Hawaii, Now this Indenture witnesseth:

That the said lessor doth hereby lease and demise unto said lessee all of that certain piece or parcel of land aforesaid situated at Koolaupoko, Island of Oahu, and known as the land of Mokapu and more particularly described in said aforementioned deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313, 314.

TO HAVE AND TO HOLD the same with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining, unto the said lessee, his executors, administrators and assigns for and during the term of twenty-five years from the first day of June, A. D. 1910.

Yielding and paying therefor rent as follows:  
[26]

For the first year the rental shall be free:

For the next ensuing four years the rent shall be at the rate of Three Hundred (\$300) Dollars per year, payable semi-annually in advance.

For the next ensuing five years the rent shall be at the rate of Four Hundred (\$400) Dollars per year, payable semi-annually in advance.

For the remaining fifteen years the rent shall be at the rate of Five Hundred (\$500) Dollars per year, payable semi-annually in advance.

And the said lessor hereby covenants with said lessee that he, paying said rent as aforesaid, shall have peaceable and quiet possession of said land during said term.

And the said lessee hereby covenants with said lessor that he will pay said rent in manner aforesaid, together with all taxes or assessments which may be assessed against said land.

IN WITNESS WHEREOF, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals the day and year first above written.

(S) JNO. D. HOLT,  
Trustee.

(S) A. V. GEAR.

KNOW ALL MEN BY THESE PRESENTS: That I, Robert Wyllie Davis of Mokapu, Koolau-poko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms of the aforementioned Deed of Trust.

(S) ROBERT WYLLIE DAVIS. [27]

Territory of Hawaii,  
City and County of Honolulu,—ss.

On this 13th day of July, 1910, before me personally appeared John D. Holt, Trustee, and A. V. Gear, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[Seal]                      (S) WILLIAM SAVIDGE,  
Notary Public First Judicial Circuit, Territory of  
Hawaii.

Territory of Hawaii,  
City and County of Honolulu,—ss.

On this 4th day of August, 1910, before me personally appeared Robert Wyllie Davis, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

[Seal]                      (S) WILLIAM SAVIDGE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

[Endorsed]: Filed Jun. 12, 1913, at 9:10 o'clock  
A. M. (Signed) J. A. Dominis, Clerk. [28]

*In the Circuit Court of the First Circuit, Territory  
of Hawaii.*

Holding Terms in the City and County of Honolulu.

\$2.00 Stamps.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Term Summons.**

The Territory of Hawaii, to the High Sheriff of the  
Territory of Hawaii, or his Deputy; the Sheriff  
of the City and County of Honolulu or his  
Deputy:

You are commanded to summons ROBERT  
WYLLIE DAVIS, defendant, in case he shall file  
written answer within twenty days after service  
hereof, to be and appear before the said Circuit  
Court at the term thereof pending immediately after  
the expiration of twenty days after service hereof;  
provided, however, if no term be pending at such  
time, then to be and appear before the said Circuit  
Court at the next succeeding term thereof, to wit,  
the 1914 term thereof, to be holden at the city and  
county of Honolulu, on Monday, the 12th day of  
January next, at 10 o'clock A. M. to show cause why  
the claim of Fred Harrison, plaintiff, should not be  
awarded to him pursuant to the tenor of his annexed  
Complaint.

And have you then and there this Writ with full

return of your [29] proceedings thereon.

WITNESS the Honorable Presiding Judge of the Circuit Court of the First Circuit, at Honolulu aforesaid, this 12th day of June, 1913.

[Seal] (Signed) J. A. DOMINIS,  
Clerk.

[Endorsed]: L. 7783. Reg. 4, Pg. 249. Circuit Court, First Circuit. Fred Harrison, Plaintiff, vs. Robert Wyllie Davis, Defendant. Term Summons. Issued at 9:10 o'clock A. M. June 12th, 1913. (Signed) J. A. Dominis, Clerk. Returned at 1:35 o'clock P. M. June 18th, 1913. (Signed) J. A. Dominis, Clerk. Service at \$1.00 each.....Cop..... at \$1.50 each..... Expense ..... Total \$..... Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff.

Territory of Hawaii,  
City and County of Honolulu,—ss.

I, William Henry, High Sheriff of the Territory of Hawaii, do hereby certify and make return that I have served the within Summons, Complaint and exhibit "A" as follows:

On Robert Wyllie Davis, therein named as defendant, at Kaneohe, District of Koolaupoko, city and county of Honolulu, Territory of Hawaii, this 16th day of June, A. D. 1913, by delivering to him a certified copy hereof and of the complaint and exhibit "A" annexed hereto and at the same time showing him the original as herein directed. Dated Kaneohe, District of Koolaupoko, city and county



of Honolulu, Territory of Hawaii, this 16th day of June, A. D. 1913.

(Signed) WM. HENRY,  
High Sheriff, Territory of Hawaii. [30]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January Term, 1913.

ACTION TO QUIET TITLE.

L. No. —.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Answer.**

Comes now the defendant above named and by way of answer to the Complaint of plaintiff herein denies each and every, all and singular, the allegation in the Complaint herein contained.

Dated.

(Signed) E. C. PETERS,  
Attorney for Defendant. [31]

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January Term, 1913.

ACTION TO QUIET TITLE.

L. No. —.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Demand for Jury Trial.**

Comes now the defendant above named and prays  
a trial by jury in the above-entitled cause.

Dated.

(Signed) E. C. PETERS,  
——— Defendant.

[Endorsed]: L. 7783. Reg. 4 Pg. 249. No. —  
Circuit Court, First Circuit, Territory of Hawaii.  
Fred Harrison, Plaintiff, vs. Robert Wyllie Davis,  
Defendant. Answer and Demand for Jury Trial.  
Filed Jul. 1, 1913, 1:35 o'clock P. M. (Signed) J. A.  
Dominis, Clerk. [32]

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January Term, 1913.

ACTION TO QUIET TITLE.

L. No. —.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Answer.**

Comes now the defendant above named and by way of answer to the Complaint of plaintiff herein denies each and every, all and singular, the allegations in the Complaint herein contained.

Dated.

(Signed) E. C. PETERS,  
Attorney for Defendant. [33]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January Term, 1913.

ACTION TO QUIET TITLE.

L. No. —.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Demand for Jury Trial.**

Comes now the defendant above named and prays  
a trial by jury in the above-entitled cause.

Dated.

(Signed) E. C. PETERS,  
——— Defendant.

[Endorsed]: L. 7783. Reg. 4, Pg. 249. No. —  
Circuit Court, First Circuit, Territory of Hawaii.  
Fred Harrison, Plaintiff, vs. Robert Wyllie Davis,  
Defendant. Answer and Demand for Jury Trial.  
Filed 6:15 P. M. July 2, 1913. Henry, Smith  
Clerk. E. C. Peters, 210-211 McCandless Building,  
Honolulu, T. H., Attorney for Defendant. [34]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January Term, 1913.

**ACTION TO QUIET TITLE.**

L. No. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Statement of Facts.**

John K. Sumner in 1892 conveyed the land of  
“Mokapu” to Bruce Cartwright in trust, “In the  
first place, to pay the rents, issues and profits arising  
therefrom or thereout so long as the lease now in

existence is in force, to me, the said party of the first part, and upon the expiration of the present lease or other sooner determination, to pay the rents, issues and profits arising from or out of said land, to my nephew Robert Wyllie Davis during the term of his natural life or in the discretion of said Robert Wyllie Davis, to permit him to reside upon said premises and while so residing to use the same for grazing or agricultural purposes. And in the second place, from and after the death of the said Robert Wyllie Davis, to convey the said premises to the heirs of the body of said Robert W. Davis lawfully begotten, and failing such heirs of his body, then to the wife if living of the said Robert W. Davis, and failing such wife, then to convey the said premises unto the heirs at law of the said Robert W. Davis, [35] share and share alike" (1).

Subsequently, Cartwright resigned and one J. D. Holt, Jr., was appointed substitute trustee (2).

In 1910 Holt as trustee with the written consent of Davis leased "Mokapu" to A. V. Gear (3), who assigned one undivided half interest in the lease (fully paid up) to Davis (4); and the other (by mesne assignments) to his wife, Addie Gear (5).

The plaintiff Harrison is the assignee in interest of Addie Gear (6).

Plaintiff in his complaint prayed that his undivided half interest in the lease be quieted in him and alleged that Davis owned the other undivided half of the same lease.

In support of his complaint plaintiff offered evidence of paper title beginning with the Sumner trust



deed and *ending himself* as the last taker; and the assignment by Gear to Davis.

QUERIES ON MOTION FOR NONSUIT:

1. Was it necessary for plaintiff to show affirmatively that the lease referred to in the trust deed had terminated prior to the Gear lease?

2. Was it necessary for plaintiff to show complete paper title from L. C. A. down to himself, or was this unnecessary upon the theory;

1. J. K. Sumner to Bruce Cartwright. Dated Aug. 16, 1892. Rec. L. 136, p. 313.
2. In re Petition John D. Holt, Jr., First Circuit Court, Eq. #1293.
3. John D. Holt, Tr., to A. V. Gear. Dated June 1, 1910. Rec. L. 343, p. 347.
4. A. V. Gear to R. W. Davis. Dated June 16, 1910.
5. A. V. Gear to C. A. Peterson. Dated Oct. 12, 1910 Rec. L. 343 p. 349. C. A. Peterson to Addie B. Gear. Dated Oct. 12, 1910. Rec. L. 343 p. 350.
6. Record foreclosure; Harrison v. Gear et ux. First Circuit Court, Eq. #1814 Assignment Cecil Brown Tr., to Fred Harrison, June, 1913. Assignment Addie B. Gear to Fred Harrison, June, 1913. [36]

(a) That plaintiff and defendant claimed from a common source of title; or

(b) Defendant took title from plaintiff's mesne assignor and was therefor estopped to deny.

(3) Presuming that the lease referred to in the

Sumner trust deed had terminated, was Holt's lease void upon the theory;

(a) Davis' discretionary power of occupancy for purposes of agriculture, etc., prevented the trustee from making a lease to a third party; and

(b) The statute of uses executed the trust and vested the legal estate in the cestui Davis.

(4) Was the Holt lease good upon the theory:

(a) That Davis consented to and ratified the Gear lease;

(b) That Davis by his consent to the Gear lease elected to take the "rents," etc., under the Sumner trust deed instead of occupying the premises for purposes of "agriculture" etc.,

(5) What interest did Davis have in the land prior to the Gear lease, presuming the lease referred to in the Sumner trust deed to have terminated?

We shall discuss the queries *seriatim*.

1. The trust deed discloses the existence of a lease covering the whole or a part of the premises granted. Plaintiff claims a lease of the premises as a whole. The powers, if any, of the trustee, could not become operative until the termination of the existing lease. Rents [37] accruing under it were payable by the trustee to Sumner. The trust deed was expressly made subject to this lease. Upon the record the lease to Gear, though silent as to the existing lease, was subject to it. The record makes the subjection as strong as though it were incorporated by reference or exception in the lease. It is impossible to say that the term demised was in *praesenti* or *futuro*.

The burden of proof is upon the plaintiff (1).

The obligation rests upon him to show that he is the owner of a valid subsisting lease; a lease existing at the time of the institution of the action. No presumption of title can be invoked. And no presumption of fiduciary integrity can supply a failure of proof and shift the burden upon the defendant. Where an exception to a lease or grant appears, the burden is upon the plaintiff to show that the land, subject to the action, is not within or subject to the exception (2).

2. We deem it unnecessary to enter into any discussion as to the derivation or source of title to land in this country. Ordinarily, it was incumbent upon the plaintiff claiming under a paper title to begin in the order of proof at the initial sovereign grant and follow his title down to himself or his ancestor as the last taker.

(3) And in the absence of any qualification of this rule, this should have been done in this case.

1. *Lunalilo Trustee v. Waihee Sugar Co.*, 7 Haw. 282.
2. *Rensens v. Lawson*, 91 Va. 226; 21 S. E. 347; *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586;  
*Harman v. Straus*, 27 S. E. 69;  
*Hall v. Martin*, 89 Ky. 9; 11 S. E. 953;  
*Mills v. Edzell*, 71 S. E. 574;  
*Fuller v. Keese*, 104 S. W. 700.  
*Kahele v. Anima*, 13 Haw. 512. [38]

(a) But plaintiff maintains that the parties claim under a common source of title and, hence, the neces-

sity of showing anterior mesne conveyances to Sumner was obviated. Hawaiian authority recognizes the rule (1). But this is not a case in which the rule can be invoked. Plaintiff assumes that the defendant's interest in the term of years is an undivided one-half under the alleged or pretended assignment to him by Gear; and predicates this assumption upon the evidence adduced by him in the case in chief. But, as herein subsequently argued by us under subdivision 3 (a), (b), the use as to the life estate in Davis was executed and a legal and equitable interest therein merged in him. Hence Holt had no title under which he could give any lease. And Davis took no greater title than his assignor in interest. The only theory upon which the plaintiff in this case could assume that Davis claimed an undivided one-half interest in the term of years which is the subject of this suit, would be upon the theory of estoppel by deed, that is to say, that Davis is estopped to question Harrison's title by reason of the fact that he accepted an undivided one-half interest in the same lease from Gear.

(b) But while ordinarily a tenant is estopped from denying the title of his landlord, the alleged leasehold interest of Davis comes from Gear

1. *McCandless v. Hon. P. Co.*, 20 Haw. 239 [39] and not from Harrison. Moreover, in an action at law to quiet title, Harrison is in no position to invoke the rule. Were the law otherwise, the action would be farcical. It might be said that the hailing of the tenant into court to test a cotenant's title constitutes a



waiver of any claim of estoppel. Moreover, this is not a case in which the use or possession of the land is involved. This is an action to try title alone. And under such circumstances, the rule is not applicable (1).

3. (a) The trust "to pay the rents," etc., might be considered as creating an active trust. But the further use "or in the discretion of said Robert Wyllie Davis to permit him to reside upon said premises" etc., does violence to any such theory. The trust as to the life estate to Robert Wyllie Davis is a mere passive one and the use must be considered as executed. So that an absolute life estate vested in Robert Wyllie Davis (2).

Hence, the lease to Gear was a nullity. The legal and equitable estate was merged in Davis. Holt had no title, and could give no title.

(b) It was Davis' discretionary right of occupancy that executed the use. The trustee could not make a lease in the face of that power conferred upon Davis by the trust deed.

1. McKie v. Anderson, 78 Tex. 207; 14 S. W. 796. 24 Cyc. 942.

2. Haw. T. & I. Co. v. Barton, 16 Haw. 301.

Estate of Boardman, 5 Haw. 146.

Kidwell v. Godfrey, 14 Haw. 138.

Kane et al. v. Perry, 3 Haw. 663-4.

Kalaeokekai v. Kahele, 7 Haw. 147-148.

Dreier v. Holt, 18 Haw. 183.

Johnson v. Blake, 32 S. E. 397.

Semis v. Howe, 72 N. Y. St. 851; affirmed 66 N. E. 975.



Wainwright v. Law, 132 N. Y. 313; affirmed  
30 N. E. 747.

Ramsay v. Marsh, 2 McCord (N. C.) 252; 13  
Am. Dec. 717.

Commended in Henderson et ux. v. Griffin,  
5 Pet. (U. S.) 151. [40]

4. (a) Davis had no right of "election." The terms of the trust deed *per se* executed the use. Nor does Davis' so-called ratification and consent to the Gear lease create a valid lease. There was no consideration for this consent or ratification either "good" or "valuable." The consent is silent as to any consideration. And the assignment to him of an undivided one-half interest occurred sixteen days later, one dollar being stated to be the consideration therefor.

Nor is Davis estopped to deny his consent. Holt was not Davis' agent either expressed or implied. He was a mere volunteer. The law of ratification in principal and agent has no application. The lease and consent are to be taken as having been executed in their logical order (1). Hence, the lease was executed before the consent. Gear dealt with Holt. After his negotiations with Holt he dealt with Davis. The trust deed was of record and was also referred to in the lease. No representation either actively or passively was made by Davis. Gear's status was not changed by any act of Davis. And there was no obligation on the part of Holt to pay Davis the rent reserved in the lease. Estoppel under these circumstances does not appear (1).

1. Walker v. Peterson, 9 Haw. 93. [41]

5. The use was executed. Davis could mortgage, sell or otherwise dispose of his life estate unhampered by the terms of the trust.

We respectfully submit that the motion for a non-suit herein is well taken.

Respectfully submitted,  
(Signed) E. C. PETERS,  
Attorney for Defendant.

Honolulu, Oct. 21, 1913.

1. Richards v. On Tai, 19 Haw. 451.

Carty v. Jarrett, 21 Haw. 274.

[Endorsed]: No. — Circuit Court, First Circuit. Territory of Hawaii. Fred Harrison, v. R. W. Davis. Statement of Facts Filed Oct. 22d, 1913, at 9: 12 A. M. (Signed.) J. Marcallino, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Defendant. [42]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January Term, 1913.

ACTION TO QUIET TITLE.

Law No. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Motion to Reopen Plaintiff's Case for Further Evidence.**

To the Honorable WM. L. WHITNEY, Second Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Now comes Fred Harrison, plaintiff in the above-entitled cause, and moves that the hearing of the evidence on behalf of plaintiff, heretofore closed on October —, 1913, and now pending on defendant's motion for nonsuit, be reopened to permit said plaintiff to produce certain additional evidence tending to show and showing that defendant herein claims, adversely to said plaintiff, the undivided one-half interest in and to that certain lease hold, title to which plaintiff seeks to quiet by this present suit, which said adverse claim of said defendant is based upon a source of title common to both plaintiff and defendant herein, to wit, that certain trust deed from John K. Sumner to Bruce Cartwright, Trustee, dated August 16, 1892, and recorded in Liber 136, page 313 of the Hawaiian Registry of Conveyances; said further evidence consisting more particularly in the record of that certain proceeding in the above-entitled court, being Equity No. 1828 of the files of said court, and [43] denominated "Cecil Brown, Trustee, Plaintiff, vs. Robert Wyllie Davis, Defendant," and more particularly the "Answer of Robert Wyllie Davis" on file as a part of said record proceeding.

This motion is *bsed* upon all the record herein, in-

cluding all the evidence heretofore taken and upon the entire files and pleadings in said cause.

Dated Honolulu, T. H., November 15, 1913.

FRED HARRISON,  
Plaintiff,

By THOMPSON, WILDER, WATSON & LY-  
MER,

(Signed) W. B. L.,  
His Attorneys.

**Notice [of Motion for Further Evidence].**

To Robert Wyllie Davis, Defendant, and E. C. Peters,  
Esquire, His Attorney:

Please take notice that the foregoing Motion will be presented before the Honorable Wm. L. Whitney, Second Judge of the Circuit Court of the First Judicial Circuit, in his courtroom in the Judiciary Building, Honolulu, on Monday, November 17, 1913, at 1:30 o'clock P. M., or as soon thereafter as counsel may be heard.

THOMPSON, WILDER, WATSON & LY-  
MER,

(Signed) W. B. L.,  
Attorneys for Plaintiff.

[Endorsed]: L. 7783. Reg. 4, Pg. 249. Circuit Court, First Circuit. Territory of Hawaii. Fred Harrison, Plaintiff, vs. Robert Wyllie Davis, Defendant. Motion to Reopen Plaintiff's Case for Further Evidence and Notice. Filed Nov. 15, 1913, at 11:40 o'clock A. M. (Signed) J. A. Dominis, Clerk. [44]

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

**ACTION TO QUIET TITLE.**

Law No. 7783.

**FREDERICK HARRISON,**

Plaintiff,

vs.

**ROBERT WYLLIE DAVIS,**

Defendant.

**Decision on Motion for Nonsuit.**

This is a statutory action to quiet title brought by the plaintiff claiming an undivided one-half in a term of years in certain lands known as the lands of Mokapu, situated on the Koolau side of the Island of Oahu. The plaintiff claims through a certain lease of the lands in question made June 1, 1910, by John D. Holt, Jr. (as substituted trustee under a deed of trust from John K. Sumner to Bruce Cartwright, dated August 16, 1892), to A. V. Gear, for the term of twenty-five years from said first day of June, 1910. Said Gear on June 16, 1910, assigned one-half of his term of years to Robert Wyllie Davis, the defendant herein, and on October 12, 1910, executed an assignment of the remainder of his term of years to one C. F. Peterson, who, in turn, assigned the same to Addie B. Gear, the wife of A. V. Gear. She, on October 21, 1910, made an assignment of the same to the plaintiff herein.

At the trial of the case plaintiff put in evidence



his paper title showing: (1) A trust deed from John K. Sumner to Bruce Cartwright of the land in question, under certain trusts, "In the first place, to pay the rents, issues, [45] and profits arising therefrom or thereout, so long as the lease now in existence is in force, to me, the said" John K. Sumner, "and upon the expiration of the present lease, or sooner determination thereof, to pay the rents, issues, and profits arising from and out of said land to my nephew, Robert Wyllie Davis, during the term of his natural life, or, in the discretion of said Robert Wyllie Davis, to permit him to reside upon said premises and while so residing to use the same for grazing and agricultural purposes; and, in the second place, from and after the death of said Robert Wyllie Davis, to convey the said premises to the heirs of the body of said Robert W. Davis lawfully begotten; and, failing such heirs of his body, then to the wife, if living, of said Robert W. Davis; and, failing such wife, then to convey the said premises to the heirs at law of the said Robert W. Davis, share and share alike."

(2) The resignation of Bruce Cartwright as such Trustee and the appointment in his place of John D. Holt, Jr.

(3) A lease from Holt, Trustee, to A. V. Gear of all the land of Mokapu for the term of twenty-five years, in which lease the defendant joined by way of consent.

(4) Assignment of one-half this term of years to the defendant herein.

(5) Assignment and mesne assignments bring-

ing the remaining half to the plaintiff.

Plaintiff having thereupon rested, the defendant moved for a nonsuit, claiming, first, that the evidence of the plaintiff showed affirmatively that there was a lease outstanding when the lease to Gear, under which plaintiff claims, was made by Holt, Trustee; second, that plaintiff had failed to deraign his title from the government; third, that [46] the Statute of Uses had executed the trust, and that the defendant was the owner of a life interest in the property, and that, therefore, the lease of Holt, Trustee, was invalid.

We will discuss the points in the reverse order in which they were raised;

First, has the Statute of Uses executed the trust? That the Statute of Uses is enforced in this jurisdiction is now certain (Hawn. Trust & Investment Co. v. Barton, 16 Hawn., 301), but even in that case a bequest of a trustee "and his successors in trust for the use and benefit of the legatees" where the will further provides that "the income of the same to be paid to him" (that is to the *cestui*) "by my executor hereinafter named, for his use and support for the term of his natural life" created an active trust, and the Statute would not execute the same.

It likewise seems to me that the further provision of the deed in question, namely, "or in the discretion of the said Robert W. Davis to permit him to reside upon said premises, and, while so residing, to use the same for grazing and agricultural purposes" creates an active duty on the part of the trustee.

It will be seen that the trustee is to "permit" him to hold the land in lieu of the rents and issues thereof only so long as he actually resides thereon and only so long as he uses the land for "grazing and agricultural purposes." The right which the defendant had in the land is less in numerous particulars than a life estate would have been. There was no absolute right or estate in the defendant at any time. There was no right to convey or assign this interest in the land during the term of Davis' natural life. All the trust deed gave to Davis was an option either to take the rents, issues, and profits, or, in lieu thereof, to reside upon the land. [47] Immediately upon his leaving the land it would again be the duty of the trustee to collect the rents, issues, and profits and pay them over to the defendant. This, in my opinion, is not a naked trust.

I am, therefore, of the opinion that the defendant did not own a life estate in the land in question and had no rights except those above indicated, namely: to receive the rents, issues, and profits or reside on the land and use the same in the manner indicated.

Second, was it necessary for plaintiff to deraign his title from the Government? It is now settled in this jurisdiction that where both parties claim from a common source of title, the plaintiff need show title only so far as the common *course* (*McCandless v. Hon. Pl. Co.*, 19 *Hawn.*, 239). The complaint herein alleges that the plaintiff is entitled to a one-half interest in a certain term of years and that the defendant claims said one-half interest also claimed

by the defendant. The plaintiff admits that the defendant is entitled to one-half of the term of years created by the lease of Holt, trustee, above referred to, but plaintiff further says that the defendant is likewise claiming the remaining one-half. Under what chain of title defendant claims to be entitled to the estate in question we are as yet unaware, for defendant's answer does not set up his title or claim, and we have not as yet reached his case. Can it, therefore, be said that either the lease from Holt to Gear or the trust deed from Sumner to Cartwright is the common source of title? Does it anywhere in the case as thus far presented "affirmatively appear that plaintiff and defendant both claim title from the same source"? All that does appear is that under a certain instrument plaintiff claims a one-half interest in the estate, and that under another instrument defendant is entitled to a like half in the same estate, but it [48] nowhere affirmatively appears that the claim of the defendant to the one-half interest claimed by the plaintiff arises out of the lease of Holt, trustee, to Gear, or out of the deed of Sumner to Cartwright. It might easily be, for example, that defendant claims under a prior lease from Holt, trustee, or under some conveyance to him of a fee or of a life estate in the land under lease from Cartwright; under a lease from Sumner or under other innumerable and possible sources of title. All these claims would be admissible under the answer of the defendant, and all such claims are sought to be quieted in the action at bar. The



action seeks to quiet the title of the plaintiff in and to the one-half interest in the term of years claimed by the plaintiff, and the source of the claim of the defendant is to the plaintiff immaterial, he praying only that his own title may be quieted as against the defendant.

On motion of the plaintiff, after closing his case, the Court permitted the case to be reopened for the purpose of introducing further evidence tending to show that the defendant herein claimed through the lease of Holt, trustee, to Cartwright, and not otherwise. Pursuant to this permission, plaintiff introduced the records in a certain case of Cecil Brown, Trustee, against Robert Wyllie Davis, Equity No. 1828, containing the answer of the defendant therein, the same Davis as the defendant herein. This answer sets up, among other things, a claim by the defendant that he is possessed of a life estate in the lands here in question by and through the deed of Sumner to Cartwright, trustee, and that said deed granted to him, Davis, a life estate in that land free and clear of all trusts. This answer is not dated, but was filed in this court on July 24, 1912. Plaintiff further offered certain conversations between the plaintiff and counsel for the defendant of a later date [49] to show a continuation of such claim up to that date, but the Court refused the offer, it appearing that such conversations were by way of compromise, and therefore, privileged and that they did not come within the rules relating to independent admissions occurring in negotiations of com-



promise. Irrespective of such admissions, the presumption of continuance would apply and this Court would, in the absence of any evidence to the contrary assume that the defendant still claimed to be entitled to a life estate by reason of the workings of the Statute of Uses of the Sumner trust deed. The same claim is strongly urged by the defendant in the present case on his motion for nonsuit, but this does not to my mind cure the vice above set out, nor make it "substantially appear that both plaintiff and defendant claimed from a common source of title." There can be no doubt that defendant does claim a life estate by reason of the execution of the trust, but it does not appear whether or not he furthermore claims other rights and estates in the land from other sources of title. The newly introduced evidence, therefore, does not, to my mind, change the status of the case, and I am compelled to find that plaintiff has not affirmatively shown that both parties claim from a common source of title, and that plaintiff is not, therefore, relieved from the necessity of deraigning his title from the Government or showing an adverse possession thereof for the statutory period.

Third, the evidence of the plaintiff affirmatively shows that at the time of the execution of the trust deed by Sumner to Cartwright there was an outstanding lease of the land in question. There is no showing that this lease had terminated at the time of the execution by Holt, trustee, of the lease to Gear above mentioned. [50]

The rule of "presumption of continuance" in its broadest terms is stated as follows: "When things are once proved to have existed in a particular state, they are presumed to continue in that state until the contrary is established by evidence either direct or presumptive." (Jones, Ev., sec. 58.)

In the case of *Lind v. Lind*, 53 Minn. 48, 51, this presumption was held controlling as to title to land in the lack of other evidence over a period of fourteen years, and although another was in possession of such land for a portion of the time, the Court being evidently of the opinion that the presumption of continuance overcame the presumption which flows from possession.

Against this presumption plaintiff sets up the presumption that the lease of Holt, trustee, was rightfully and not wrongfully made. I do not understand that there is any presumption that a trustee in giving a lease to a third party acted in any different manner than any other person or that there is any special presumption arising in such cases. There is a general presumption undoubtedly that men act rightfully and not wrongfully, but I am of the opinion that such presumption will not overcome the presumption of a continuance of ownership when that ownership is once shown by the evidence.

Nor do I think that plaintiff is relieved from his burden of proof by reason of the fact, as he claims, that it was not necessary for him to put in evidence the trust deed of Sumner to Cartwright. The deed is in evidence as part of his case and affirmatively

shows an outstanding lease. Furthermore, as I have already held, the lease of Holt trustee, to Gear does not affirmatively appear to be the common source of title, and plaintiff was, therefore, obliged to put in the trust deed as part of his title.

Plaintiff claims that the defendant is now estopped [51] from claiming the benefit of a failure of proof.

This estoppel it is claimed arises from two sources; (1) that a tenant in common cannot deny his landlord's title, and that, therefore, the defendant herein cannot now deny that Holt, trustee, had title in him to give the lease above referred to; and (2) that the defendant having joined in that lease by way of consent and having likewise assented to the mesne conveyances by which plaintiff became possessed of his one-half interest he thereby misled the plaintiff to his hurt and is estopped at this time to deny the validity of plaintiff's title.

As to the first ground of estoppel, such cannot at this stage of the case concern us. The defendant is evidently disputing the title of plaintiff, who claims as his, the defendant's, cotenant, but until it appears that the defendant *entered into possession* of the lands in question as a cotenant of the plaintiff, no estoppel will arise against his pleading a lack of title in his cotenant, the plaintiff herein. (Cooper v. Fox, 67 Miss. 237, 7 Sou. 343.) As I have heretofore remarked, there is no showing under what defendant claims his title.

Nor, if the defendant were actually in possession

of the land or an undivided portion thereof at the time of the lease to Gear and thereafter accepted an assignment from Gear of a one-half interest in said lease and acknowledged Gear as a cotenant, would he be estopped to claim that such cotenant had no title. (Washington v. Conrad, 21 Tex. 562.) It does not yet appear whether or not Davis was in possession at the time of the lease to Gear.

The same holds true of the relation between the defendant and Holt, trustee. The evidence shows an assignment [52] of one-half of the Gear estate for years to the defendant. This assignment, although it contains covenants on the part of the defendant, is not signed by the defendant, is not acknowledged nor recorded, and was brought into the case from the possession not of the defendant, but of the plaintiff. There is no evidence that the assignment was ever accepted by the defendant or that the defendant went into possession of the land by reason of or under that assignment. These things must be shown before the well recognized estoppel between a landlord and his tenant arises.

This brings us to the second alleged cause of estoppel, namely, the estoppel claimed by reason of the acts of the defendant in joining in the lease from Holt, trustee, to Gear, under which lease plaintiff now claims. That joinder is in the following words: "Know All Men By These Presents, that I, Robert Wyllie Davis of Mokapu, Koolaupoko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the



same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms of the aforementioned deed of trust.” (Signed) “Robert Wyllie Davis.” (No signature of wife.)

If this is to act as an estoppel, the elements of estoppel must be present. These elements of estoppel (Pomeroy Eq. Jur., sec. 805; II Pom. Eq. Jur., 3 ed., p. 1423) include, “(5) the conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it.” There is no evidence in the case at bar tending to show that the plaintiff herein either relied on this consent of the defendant to the lease in question, or, relying thereon, was led to act upon it. Without such evidence, the defendant cannot be held to be estopped by [53] his act of consent and ratification.

I am, therefore, of the opinion that the motion for a nonsuit should be granted, and it is so ORDERED.

(Signed) WM. L. WHITNEY,

Second Judge.

Honolulu, T. H., December 22d, 1913.

[Endorsed]: L. 7783. Reg. 4, Pg. 249. Circuit Court, First Circuit, Territory of Hawaii. Frederick Harrison, v. Robert Wyllie Davis. Decision on Motion for Nonsuit. Filed 10:15 A. M. December 22, 1913. (Signed) Henry Smith, Clerk. [54]



**[Exception to Decision on Motion for Nonsuit.]**

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

**ACTION TO QUIET TITLE.**

Law No. 7783.

**FREDERICK HARRISON,**

Plaintiff,

vs.

**ROBERT WYLLIE DAVIS,**

Defendant.

**EXCEPTION TO DECISION.**

Comes now the plaintiff above named by Thompson, Wilder, Watson & Lymer, his attorneys, and excepts to the decision on defendant's motion for nonsuit, herein entered on the 22d day of December, 1913, and to each and every part of said decision.

Dated Honolulu, this 23d day of December, 1913.

**FREDERICK HARRISON,**

By **THOMPSON, WILDER, WATSON &  
LYMER,**

(Signed) W. B. L.,  
His Attorneys.

[Endorsed]: L. 7783. Reg. 4, Pg. 249. Circuit Court, First Circuit, Territory of Hawaii. Frederick Harrison, Plaintiff, v. Robert Wyllie Davis, Defendant. Exception to Decision. Filed Dec. 23, 1913, 3:35 o'clock P. M. (Signed) J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11

Campbell Block, Honolulu, Attorneys for Plaintiff.

[55]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January, A. D. 1913, Term.

ACTION TO QUIET TITLE.

L. No. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT T. WYLLIE DAVIS,

Defendant.

**Judgment [in Circuit Court, Territory of Hawaii].**

This action by petition wherein plaintiff claimed to be entitled to one undivided half for a term of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu, Territory of Hawaii, known as the land of "Mokapu," and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the registrar of conveyances of the Territory of Hawaii at Honolulu, in Book 343, pages 347-351, came on regularly for hearing before this Court on this 17th day of October, A. D. 1913, when the parties appeared personally and by their respective attorneys and were at issue and ready for trial before the Court, jury having been waived;

And evidence both oral and documentary having

been admitted and adduced by the plaintiff herein, and he having rested, and the defendant having moved for a nonsuit upon the ground (1) that the evidence of the plaintiff showed affirmatively that there was a lease outstanding when the lease to Gear, under which plaintiff claimed, was made by Holt, Trustee; (2) that plaintiff had failed to deraign his title [56] from the government; (3) that the Statute of Uses had executed the trust, and that the defendant was the owner of a life interest in the property, and that therefore the lease of Holt Trustee, was invalid;

And the Court having granted such motion of defendant for a nonsuit;

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff take nothing by his said action, and that the complaint of plaintiff herein be dismissed, without prejudice, and that defendant have and recover of plaintiff his costs herein taxed at the sum of \$29.00.

Dated this 2d day of January, A. D. 1914.

By the COURT,  
(Signed) J. MARCALLINO,  
Clerk.

[Endorsed]: L. 7783. Reg. 4, Pg. 249. L. No. 7783. Circuit Court, First Circuit, Territory of Hawaii. Fred Harrison vs. Robert W. Davis. Judgment. Filed Jan. 2, 1914, 2:30 o'clock P. M. (Signed) J. A. Dominis, Clerk. [57]

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

**ACTION TO QUIET TITLE.**

L. No. 7783.

**FREDERICK HARRISON,**

Plaintiff,

vs.

**ROBERT T. WYLLIE DAVIS,**

Defendant.

**Exception to Judgment [in Circuit Court, Territory  
of Hawaii].**

Comes now the plaintiff above named by Thompson, Wilder, Watson & Lymer, his attorneys and excepts to the judgment granting defendant's motion for nonsuit herein entered on the 2d  
W. B. L. day of January 1914, and to each and every part of said judgment.

Dated Honolulu this 2d day of January, 1914.

**FREDERICK HARRISON.**

By **THOMPSON, WILDER, WATSON & LYMER,**

(Signed) W. B. L.,

His Attorneys.

[Endorsed]: L. 7783. Reg. 4 Pg. 249. Circuit Court, First Circuit, Territory of Hawaii. Frederick Harrison, Plaintiff, vs. Robert Wyllie Davis, Defendant. Exception to Judgment. Filed Jan. 2, 1914, at 2:30 o'clock P. M. (Signed) J. A. Dominis, Clerk. [58]

**[Opinion of Supreme Court, Territory of Hawaii.]**

*In the Supreme Court of the Territory of Hawaii.*

October Term, 1913.

FRED HARRISON

v.

ROBERT WYLLIE DAVIS,

EXCEPTIONS FROM CIRCUIT COURT, FIRST  
CIRCUIT.

Argued February 16, 1914. Decided March 6, 1914.

ROBERTSON, C. J., PERRY AND DE BOLT, JJ.

Evidence—Admissions in Pleadings in Another Suit.

The allegations in a pleading in one suit, while open to explanation or rebuttal, are receivable as against the party in a subsequent suit as his solemn admission of the truth of the facts so alleged.

Quieting Title—Admission in Pleadings in Another Suit as Proof of Title.—Upon the trial in a statutory action to quiet title the defendant's admission in a pleading in another suit of the truth of the fact that at a time stated the title was in a person from whom the defendant then claimed and from whom the plaintiff also claims in the action on trial constitutes evidence, available to the present plaintiff, of the fact mentioned and is *prima facie* proof of that fact.

Trusts—Statute of Uses—Trust to Protect Estate.—

If the purpose of a trust is to protect the estate for a given time or until the death of some one,



the operation of the statute of uses is excluded and the trusts or uses remain mere equitable estates. [59]

Trusts—Ratification of Lease by Trustee—Waiver of Right to Occupy Trust Property.—Where land is conveyed in trust to pay the rents, issues, and profits to D during his life “or in the discretion” of D “to permit him to reside upon” the land “and while so residing to use the same for grazing or agricultural purposes,” ratification by D of a lease by the trustee to another operates as a waiver of D’s right to reside upon and use the land in the manner mentioned. [60]

#### OPINION OF THE COURT BY PERRY, J.

This is a statutory action to quiet the title to a certain tract of land known as “Mokapu” and situate in the district of Koolaupoko on this island. The plaintiff claims an undivided one-half interest under a lease for a term of twenty-five years from June 1, 1910. At the trial he adduced evidence tending to show the following facts: that on August 16, 1892, John K. Sumner conveyed the land in question to Bruce Cartwright in trust “in the first place to pay the rents, issues and profits arising therefrom or thereout so long as the lease now in existence is in force” to the grantor “and upon the expiration of the present lease or other sooner determination thereof to pay the rents, issues and profits arising from or out of said land” to the grantor’s nephew Robert Wyllie Davis, the present defendant, “during the term of his natural life or in the discretion of the

said Robert Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing or agricultural purposes; and in the second place from and after the death of the said Robert Wyllie Davis to convey the said premises to the heirs of the body of said Robert W. Davis lawfully begotten and failing such heirs of his body, then to the wife if living of the said Robert W. Davis, and failing such wife, then to convey the said premises unto the heirs at law of the said Robert W. Davis share and share alike"; that Cartwright resigned as trustee and that John D. Holt, Jr., was on August 29, 1902, appointed as his successor by a court of equity; that on June 1, 1910, Holt as trustee executed a lease of the property to A. V. Gear for 25 years from June 1, 1910, the lessor consenting that the lessee should "have peaceable and quiet possession of said land during said term"; that not later than August 4, [61] 1910, the defendant signed and acknowledged the following statement, apparently as a part of the same transaction, and in any event relating to the lease just mentioned: "Know all men by these presents, that I, Robert Wyllie Davis of Mokapu, Koolau-poko, Island of Oahu, and I, Mary Kealohanui Davis wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms of the aforementioned Deed of Trust"; that on June 16, 1910, A. V. Gear executed an assignment to defendant of an undivided one-half interest in the Holt lease and in the premises thereby

demised, the instrument of assignment not appearing, however, to have been signed by defendant; that A. V. Gear's remaining undivided one-half interest in the lease and in the demised premises passed by successive assignments to C. A. Peterson and to Addie B. Gear and finally, on October 21, 1910, to the plaintiff.

At the conclusion of the plaintiff's case the defendant moved for a nonsuit on the following grounds: "(1) that the evidence of the plaintiff showed affirmatively that there was a lease outstanding when the lease to Gear, under which plaintiff claimed, was made by Holt, Trustee; (2) that plaintiff had failed to deraign his title from the Government; (3) that the Statute of Uses had executed the trust, and that the defendant was the owner of a life interest in the property, and that therefore the lease to Holt Trustee, was invalid; (4) that the plaintiff had failed to show, nor is there any evidence tending to show that the plaintiff is entitled to an undivided half for a term of years until June, 1935, of the land of Mokapu as set forth in Paragraph 1 of the Complaint; (5) that the plaintiff has failed to show and there is no evidence either competent or otherwise [62] tending to show that plaintiff had any interest in the land known as Mokapu aforesaid." The motion was granted on the first and second grounds. Plaintiff excepts. The grounds of the motion will be considered in their order.

1. The deed of trust introduced in evidence by the plaintiff did tend to show that at the date of its execution a lease of Mokapu was outstanding. That

lease, undoubtedly, while in force would be effective as against any lease executed by the trustee. Assuming that from the mere fact of the existence of the earlier lease a presumption could be indulged in of the continuance of that lease in force until the contrary was shown, that presumption was sufficiently overcome, *prima facie*, by the plaintiff. He introduced in evidence the answer filed by this same defendant in July, 1912, in a partition suit in which the present plaintiff was in interest the real party plaintiff. In that answer the defendant, after reciting the Sumner deed of trust, alleged that "pursuant to said trust deed, with the permission of the grantee therein named, this respondent on said last named day" (August 16, 1892) "went into possession of said premises to reside thereon and use the same for grazing and agricultural purposes and ever since has been in possession thereof and residing thereon and using the same for grazing and agricultural purposes." This constituted an admission on the defendant's part that as early as August 16, 1892, the lease referred to in the deed of trust ceased in some manner to exist. Without a determination of that lease, the defendant could not, whether with or without the trustee's "permission," have exercised the discretion vested in him by the trust deed to reside upon the land, take possession of it and use it for grazing or agricultural purposes. This admission was competent evidence of the determination [63] of the earlier lease and until rebutted is sufficient to sustain plaintiff's case upon the point.



2. Ordinarily, upon an issue of title, the plaintiff introduces evidence to prove that his title was in its inception derived from the Government and thence passed to him by mesne conveyances, devise, descent or adverse possession. In the case at bar there was no evidence tending to show how the title passed from the Government to Sumner. The plaintiff's claim is that it was not necessary for him to deraign title from the Government, because by the introduction of this defendant's answer, already referred to, in the suit for partition, he had shown that both parties to the litigation claimed title from the same source, that is, from the Sumner deed of trust. The defendant, on the other hand, calls attention to the fact that neither in his answer nor otherwise in the case at bar has he disclosed from what source he now claims title and that therefore the rule invoked by the plaintiff is inapplicable. It is doubtless well established that, as it has been variously stated, "when it appears in an action of ejectment that both parties claim title from the same grantor neither can take advantage of alleged defects in the chain of title prior to the common source" (*McCandless v. Plantation Co.*, 19 Haw. 239); "if both parties claim title from the same source, neither is at liberty to deny that such person had title" (*Gaines v. New Orleans*, 6 Wal. 642, 715); "a party is estopped from denying a title under which he claims to derive his own right to the premises" (*Carson v. Dundas*, 39 Neb. 503, 510). In the cases in which this rule is enforced in its entirety, the defendant has asserted, in the very action in which



title is being tried, his claim to the title solely as coming from the common source. The rule itself is simply an application of the principle of estoppel. In the case at bar [64] the defendant has not yet disclosed from what source he claims to derive title. The mere fact that in the suit for partition he pleaded a title derived from Sumner does not estop him from setting up, if he can, a title superior in its origin to Sumner's. All that was required of him in the suit for partition, in order to obtain a trial at law, was to show that he disputed in good faith the plaintiff's claim of title. He may now continue in equal good faith, to dispute the title, even though he sets up a claim of a different or superior title. The rule of estoppel does not apply and proof that Sumner had title was therefore necessary. A *prima facie* showing of that fact was made, however, by the plaintiff by the introduction in evidence of the defendant's answer in the partition suit. In that document, signed by the defendant personally, he alleged that on "the 16th day of August, 1892, one John K. Sumner, for a good and valuable consideration, by indenture of deed of even date" (further describing it) "did grant, bargain and sell unto one Bruce Cartwright, his heirs and assigns forever, said piece or parcel of land called and known as 'Mokapu,' in trust," setting forth the same trusts above recited. The allegations in a pleading in one suit, while open to explanation or rebuttal, are receivable against the party in a subsequent suit as his solemn admission of the truth of the facts so alleged. 11 A. & E. Ency. L.

449; 1 Greenleaf, Ev., § 212; *Blanks v. Klein*, 53 Fed. 436, 438. The allegation just quoted from the answer in partition was a solemn admission by defendant of the truth of the fact that Sumner did by the trust deed convey to the trustee the title to Mokapu and therefore, by necessary [65] inference, of the further fact that immediately prior to the execution of the deed the title was in Sumner. The defendant may, if he can, explain or rebut his admission, but until he does so it stands as a *prima facie* showing of title in Sumner at the time mentioned. See *Anderson v. Reid*, 10 App. Cs., D. C. 426, 429; *Smith v. Lindsey*, 89 Mo. 76, 79, 80; *Bonds v. Smith*, 106 N. C. 553, 565; *Brown v. Brown*, 45 Mo. 412, 415; 2 Greenleaf, Ev., § 307. It may be added that in some of the decisions on the subject there is, perhaps, an inexactness of statement, resulting in an apparent confusion of the rule, on the one hand, that evidence of title back of the common source is not necessary when both parties at the trial claim solely from the common source and when, therefore, each is estopped to deny that the title was in the common source and of the principle, on the other hand, that a defendant's solemn admission in a pleading in another suit of the truth of the fact that the title was in the so-called common source constitutes evidence, available to his adversary, of that fact; but none of them, as far as we are aware, can be properly regarded as authorities against the view here adopted.

3. Under the third ground of the motion for a nonsuit the defendant's contention is that "the trust as to the life estate to Davis is a mere passive one and

the use must be considered as executed"; that "an absolute life estate vested" in Davis and that "hence the lease to Gear was a nullity, the legal and equitable estate was merged in Davis and Holt had no title and could give no title." It is settled in this jurisdiction that to the application of the statute of uses "there are certain well-defined exceptions or rather rules of construction which limit the effect of the statute," that special or active trusts were never within the purview of the statute and that "if the purpose of the trust is to protect the estate for a given [66] time or until the death of some one, \* \* \* the operation of the statute is excluded and the trusts or uses remain mere equitable estates." *Estate of Boardman*, 5 Haw. 146, 147; *Kidwell v. Godfrey*, 14 Haw. 138, 140. The trust under consideration was, after the termination of the lease referred to in the deed, to pay the rents, issues and profits to Davis for life or in the discretion of Davis to permit him to reside upon the land and while so residing to use it for grazing or agricultural purposes. The right was not granted to Davis to use the land directly for the remainder of his life, but only during the period or periods when he might see fit to reside on it; nor was the right given him even during these periods of residence to use the land for any and all legitimate purposes. Both the time and the manner of the use were restricted. It is obvious that one of the purposes of the trust was to protect the estate even as against Davis himself at least until the death of Davis, and thereafter to convey the remainder to those entitled under the terms of the instrument.

Even as to the interests of Davis, this was not a mere passive trust. The trustee had active duties to perform for the protection of the property and the trust as to Davis is not within the operation of the statute.

4 and 5. In the light of the rulings above made the plaintiff made a *prima facie* showing of ownership of at least an undivided one-half interest in the lease from Holt. It need only be added that the possibility of the Holt lease being inoperative by reason of an exercise by Davis of his right to reside on the property and to use it for grazing or agricultural purposes was excluded, *prima facie*, by plaintiff's proof that Davis executed the document already referred to whereby he consented to the lease and ratified and confirmed it. Whatever other legal effects may be attributable to that document, it was operative [67] at least as a waiver by Davis of his right to reside upon and so use the property.

The exceptions are sustained, the judgment set aside and the cause remanded with directions to deny the motion for a nonsuit and to take such further proceedings, not inconsistent with this opinion, as may be appropriate.

W. B. LYMER (THOMPSON, WILDER,  
WATSON & LYMER, on the Brief), for  
Plaintiff.

E. C. PETERS, for Defendant.

ANTONIO PERRY.

J. T. DEBOLT. [68]

CONCURRING OPINION OF ROBERTSON, C. J.

I concur in the opinion of the majority of the court, but desire to place my concurrence on the



second point upon a different ground. In an action of ejectment or to quiet title to land it is incumbent on the plaintiff to prove title and he ordinarily does that by deraigning the title from its origin. But where there is a subsequent common source from which both plaintiff and defendant claim title to the premises in dispute the state of the title anterior to that source is immaterial since though it be defective the defendant would be estopped from taking any advantage of the defect. The fact that the parties claim title from a common source may be made to appear by stipulation as in the case of *Nahaolelua v. Heen*, 20 Haw. 613, or by evidence adduced by the defendant as in the case of *McCandless v. Honolulu Plant. Co.*, 19 Haw. 239. In the case at bar there was no stipulation between the parties, but counsel for the plaintiff contend that the plaintiff could and did show *prima facie* that he and the defendant do claim from a common source, namely, the deed from Sumner to Cartwright. I think that this contention is correct. The cases of *Anderson v. Reid*, *Smith v. Lindsey* and *Bonds v. Smith*, cited in the majority opinion, show that the plaintiff in a case of this kind, instead of tracing his title back to its original source, may show that there is an intermediate common source of claim and then trace his title down from that source, as was done here. The following cases are to the same effect, *Mobley v. Griffin*, 104 N. C. 112, 115; *Laidley v. Land Co.*, 30 W. Va. 505, 509; *Finch v. Ullman*, 105 Mo. 255; *Mitchell v. Cleveland*, 57 S. E. (S. C.) 33. In *Holbrook v. Brenner*, 31 Ill.



501, 511, the Court said: "When it is found that the defendant has purchased by deed, and is in possession of the [69] premises, it is *prima facie* evidence that he claims under that title. And if he and plaintiff claim from the same source, it is not necessary for the latter to trace his title further in the first instance. When he exhibits a title from the same source better than that of the defendant, it is sufficient to put him upon his defense." And in *Millis v. Roof*, 121 Ind. 360, 363, it was held that "If the defendant asserts any other or superior title, or a title adverse to that under which plaintiff claims, it lies upon him to bring it forward." See also 2 Greenleaf, Ev., sec. 307.

The statement contained in the answer of the defendant in the partition suit that he entered and took possession of the land pursuant to the trust deed to Cartwright was evidence that that deed is the source of title under which he claims as well as being the source of the plaintiff's claim. In other words, a common source of title was shown. The defendant may, if he can, show in defense that his title from the common source is as good or better than that of the plaintiff, or that he has and claims under another and superior title. But when the plaintiff rested he had made out a *prima facie* case, and the nonsuit should not have been granted.

A. G. M. ROBERTSON.

[Endorsed]: No. 757. Supreme Court, Territory of Hawaii. October Term, 1913. Fred Harrison v. Robert Wyllie Davis. Opinion. Filed March 6, 1914, at 2:12 P. M. J. A. Thompson, Clerk. [70]

*In the Supreme Court of the Territory of Hawaii.*

October Term, 1913.

FRED HARRISON,

Plaintiff-Appellant,

vs.

ROBERT WYLLIE DAVIS,

Defendant-Appellee.

**[Notice of Decision of Supreme Court, Territory of  
Hawaii, on Exceptions.]**

**EXCEPTIONS FROM CIRCUIT COURT, FIRST  
CIRCUIT.**

To the Honorable WILLIAM L. WHITNEY, Sec-  
ond Judge of the Circuit Court of the First  
Judicial Circuit, Territory of Hawaii.

You will please take notice that the Supreme  
Court in the above-entitled cause has made the fol-  
lowing decision on exceptions:

**“DECISION ON EXCEPTIONS.**

“In the above-entitled cause, pursuant to the  
opinion of the above-entitled court, filed March 6,  
1914, the plaintiff’s exceptions are sustained, the  
judgment set aside and the cause remanded with  
directions to deny the motion for a nonsuit and to  
take such further proceedings, not inconsistent with  
said opinion, as may be appropriate.”

Dated Honolulu, T. H., March 7, 1914.

By the Court,

[Seal]

(Sig.) J. A. THOMPSON,  
Clerk Supreme Court. [71]

**Certificate.**

Territory of Hawaii,

City and County of Honolulu,—ss.

I, J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing document and attached hereto is a full, true and correct copy of the original “Notice of Decision on Exceptions” which is now on file in the office of the clerk of the Supreme Court in the foregoing-entitled cause (Number 757).

Witness my hand and the seal of said court at Honolulu, city and county of Honolulu, this 7th day of March, A. D. 1914.

[Seal]                      (Signed) J. A. THOMPSON,  
Clerk Supreme Court of the Territory of Hawaii.

[Endorsed]: L. 7783. Reg. 4, pg. — Circuit Court First Circuit Territory of Hawaii. Fred Harrison, Plaintiff-Appellant, vs. Robert Wyllie Davis, Defendant-Appellee. Notice of Decision on Exceptions. Filed Mar. 7, 1914, 12 M. o'clock *P. M.* J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff-Appellant. [72]

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

L. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

DECISION.

This statutory action to quiet title to an undivided one-half interest in the term for years mentioned and described in the Bill of Complaint herein, being a 25-year term from June 1, 1910, in the land known as Mokapu, was commenced by the filing in this court on June 12th, 1913, of the plaintiff's Bill of Complaint. An answer of general denial having been filed by defendant and the cause coming on to be tried, and the plaintiff having adduced certain evidence, documentary and oral, in his behalf, and having rested his case, the defendant moved for a judgment of nonsuit against plaintiff which this Court granted and said judgment of nonsuit was duly made, entered and filed herein on January 2d, 1914.

The defendant thereafter, by Bill of Exceptions, caused said judgment to be reviewed by the Supreme Court of the Territory of Hawaii, which Court, by its opinion rendered March 6, 1914, held that the action of this Court in entering said judg-



ment of nonsuit against the plaintiff herein, constituted error, and specifically deciding that the said plaintiff had made out a *prima facie* case by the evidence he had adduced. In this connection the Supreme Court expressly stated (in the concurring opinion of the Chief Justice, 22 Haw. 59) that, upon the further trial of the cause, "the defendant may, if he can, [73] show in defense that his title from the common source is as good or better than that of the plaintiff, or that he has and claims under another and superior title." Other language on page 55 of the Supreme Court's opinion seems declarative of the principle (which this Court considers sound) that, in the case at bar, the only proper defense on the part of defendant to plaintiff's *prima facie* case, would be a showing on defendant's part, of an equal or superior title in himself in the term for years as to which title is sought to be quieted.

The defendant, on the resumption of the trial of this cause after the judgment of nonsuit was vacated, offered in evidence, over plaintiff's objection, a deed of an undivided one-half of the land of Mokapu, from defendant and his wife to John K. Sumner, dated January 1, 1906, and recorded in Liber 302, at page 192 of the Hawaiian Registry of Conveyances; and a mortgage of an undivided one-half of said land from defendant and his wife to the said Sumner, dated January 2, 1906, and recorded in Liber 303 at page 91 of said Registry.

The Court reserved its ruling on the admissibility of said documents.



Defendant then offered certain oral evidence as to the transfer of defendant's interest under said documents and on the nature of the alleged residence on and possession of the land of Mokapu by the said Sumner pursuant to said transfers.

Defendant then having rested without offering any other substantial evidence, and the matter of the admissibility of said evidence having been argued at length and taken under advisement by the Court, the Court ruled, in open court on June 23d, 1914, at a further hearing of the above-entitled cause, that said documents, constituting evidence solely of title in a stranger and not tending in any manner to show in defendant a title in and to the land of Mokapu equal or superior to that of plaintiff, [74] were inadmissible in evidence, as well as the oral evidence of residence on or occupation of Mokapu by the said Sumner, for the same reasons. Said documents and evidence being excluded from the case, there is no substantial evidence which in any degree tends to rebut the *prima facie* case heretofore established by the plaintiff, and judgment should accordingly be entered for plaintiff.

Let judgment enter for plaintiff for an undivided one-half interest in said term *for* years and for costs.

(Signed) WM. L. WHITNEY,

Second Judge, First Circuit Court.

Dated at Honolulu, this 25th day of June, A. D. 1914.

[Endorsed]: L. No. 7783. Reg. 4, pg. 249. Circuit Court, First Circuit, Territory of Hawaii. Fred Harrison, Plaintiff, vs. Robert Wyllie Davis, Defendant. Decision. Filed Jun. 25, 1914, 2:20 o'clock P. M. (Signed) J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 2-11, Campbell Block, Honolulu, Attorneys for Plaintiff. [75]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Judgment.**

This cause coming on to be heard, jury waived, and the parties being at issue and appearing before the Court in person and by their respective attorneys, and the Court having heard the parties and having, on the 25th day of June, 1914, rendered its decision in writing finding for the plaintiff for an undivided one-half interest in and to the term *for* years described in plaintiff's Bill of Complaint; it is therefore

ORDERED, ADJUDGED, AND DECREED that the plaintiff is the owner and entitled to the immediate possession of an undivided one-half for a term

of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu, Territory of Hawaii, known as the land of Mokapu, and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the Registrar of Conveyances, in said Honolulu, in Book 343, at pages 347-351;

That plaintiff's title and ownership in said undivided one-half interest in said term for years is quieted and confirmed accordingly; [76]

And that plaintiff is entitled to have and recover against defendant his costs in this action taxed in the sum of \$41.75.

Done at Honolulu, T. H., this 26th day of June, A. D. 1914.

By the Court.

(Signed) A. K. AONA,

Clerk.

Let judgment issue.

(Signed) WM. L. WHITNEY, 2d J.

[Endorsed]: L. No. 7783. Reg. 4, pg. 249. Circuit Court, First Circuit, Territory of Hawaii. Fred Harrison, Plaintiff, vs. Robert Wyllie Davis, Defendant. Judgment. Filed June 26, 1914, at 9:50 A. M. (Signed) A. K. Aona, Clerk. Thompson, Wilder, Watson & Lymer, 2-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [77]

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

LAW NO. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Exception to Decision.**

Now comes the defendant named in the above-entitled cause and hereby *enter* this his exception to *to* the decision of the Honorable William L. Whitney, Second Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, heretofore rendered, entered and filed herein on the 25th day of June, A. D. 1914, as being contrary to the law and the evidence and to the weight of the evidence.

Dated this 30th day of June, A. D. 1914.

(Signed) E. C. PETERS,

Attorney for Robert Wyllie Davis.

The foregoing exception is hereby allowed.

(Signed) WM. L. WHITNEY,

Judge Presiding at the Trial.

[Endorsed]: Service of the within exception to decision is hereby admitted this 30th day of June, A. D. 1914. Thompson, Wilder, Watson & Lymer. (Signed) W. B. L., Attorneys for Plaintiff. L. No. 7783. Circuit Court, First Circuit, Territory of

Hawaii. Fred Harrison vs. Robert Wyllie Davis.  
Exception to Decision. Filed at 5:30 P. M. June  
30, 1914. (Signed) Henry Smith, Clerk. E. C.  
Peters, 210-211 McCandless Building, Honolulu,  
T. H., Attorney for Defendant. [78]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

LAW NO. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Exception to Judgment.**

Now comes the defendant named in the above-entitled cause and hereby *enter* this his exception to the judgment of the Court heretofore entered, filed and docketed herein on the 26th day of June, A. D. 1914, as being contrary to the law and the evidence and to the weight of the evidence.

Dated at Honolulu, T. H., this 30th day of June, A. D. 1914.

(Signed) E. C. PETERS,  
Attorney for Robert Wyllie Davis.

The foregoing exception is hereby allowed.

(Signed) WM. L. WHITNEY,  
Judge Presiding at the Trial.



[Endorsed]: Service of the within exception to judgment is hereby admitted this 30th day of June, A. D. 1914. Thompson, Wilder, Watson & Lymer. (Signed) W. B. L., Attorneys for Plaintiff. L. No. 7783. Circuit 4/263 Court, First Circuit, Territory of Hawaii. Fred Harrison vs. Robert Wyllie Davis. Exception to Judgment costs, 31.25. Filed at 5:30 P. M. June 30, 1914. (Signed) Henry Smith, Clerk. E. C. Peters, 210-211, McCandless Building, Honolulu, T. H., Attorney for Defendant. [79]

**[Minutes—October 17, 1913.]**

Friday, October 17th, 1913.

At 9 A. M. The Court Convenes.

Present: Honorable WILLIAM L. WHITNEY,  
Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

ROBERT W. DAVIS,

Defendant.

CLERK'S MINUTES.

TRIAL.

W. B. LYMER, Esq., Appearing for Plaintiff.

E. C. PETERS, Esq., Appearing for Defendant.

Counsel for the parties waive trial by jury in open court.

Mr. Lymer calls George C. Kopa, sworn.

Mr. Lymer offers in evidence Equity Record No. 1293, First Circuit Court records. Received in evidence for Identification, subject to ruling of the Court as to its admissibility as evidence.

Mr. Lymer offers in evidence copy of record in Liber 343 pages 347-351. Received and marked Plaintiff's Exhibit "A" for Identification.

Fred Harrison, sworn.

Mr. Peters offers in evidence Equity Record #1814 F. Harrison [80] vs. A. V. Gear. Received in evidence.

Mr. Peters offers in evidence Mortgage dated October 24, 1910, Addie B. Gear to F. Harrison. Received and marked Defendant's Exhibit 1.

Mr. Peters offers in evidence Mortgage November 16, 1910, A. V. Gear to Fred Harrison. Received and marked Defendant's Exhibit 2 for Identification.

Mr. Lymer offers in evidence agreement June 6, 1913, Addie B. Gear and Fred Harrison. Received in evidence and marked Plaintiff's Exhibit "C."

William T. Rawlins, sworn.

A. V. Gear, sworn.

Mr. Lymer offers in evidence deed June 9, 1913, C. Brown, Trustee to F. Harrison. Received and marked Plaintiff's Exhibit "D."

11:47 P. M. The Court orders further trial herein continued till 2 P. M., at which time the Court further resits *and* in the trial of this case.

Counsel are present in court.

A. V. Gear resumes the stand.

Mr. Lymer offers in evidence assignment by A. V.

Gear to R. W. Davis dated June 16th, 1910. Received and marked Plaintiff's Exhibit "E."

2:27 P. M. Plaintiff rests.

Mr. Peters moves for a nonsuit on the ground that the plaintiff has failed to show, or offered any evidence tending to show that plaintiff is entitled completely or to an undivided one-half for a term of years till June 1, 1935, to the land of Mokapu as set out in paragraph 1 of the Complaint; 2d, that plaintiff has failed to show that he has any interest in the Land of Mokapu; 3d, that the alleged and pretended appointment of John D. Holt, Jr., Trustee, by a Judge of the First Circuit Court was and is null and void in this that the Circuit Court was without the jurisdiction; [81] 4th that it affirmatively appears from the evidence that at the time of the lease by J. D. Holt, Jr., Trustee, to A. V. Gear, defendant was entitled to a life estate free from any and all trusts.

Mr. Peters argues, concluding at 2:30 P. M.

Mr. Lymer argues, concluding at 2:42 P. M.

Mr. Peters replies, concluding at 2:56 P. M.

Mr. Lymer replies, concluding at 3:12 P. M.

Mr. Peters replies, concluding at 3:17 P. M.

The Court takes matter under advisement.

Mr. Wm. T. Tawlins is recalled by Mr. Lymer and examined in rebuttal.

3:35 P. M. The Court orders trial continued to follow the McQuen divorce case.

By the Court.

(Signed) J. MARCALLINO,

Clerk.

**[Minutes—October 27, 1913.]**

Monday, October 27th, 1913.

At 9 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,  
Second Judge Presiding.  
JOHN MARCALLINO, Clerk.  
H. R. JORDAN, Stenographer.

L. 7783.

**ACTION TO QUIET TITLE.**

**FRED HARRISON,**

Plaintiff,

vs.

**R. W. DAVIS,**

Defendant.

**CONTINUANCE.**

The Court orders continuance herein till Friday,  
October 31st, 1913, at 9 A. M.

By the Court.

(Signed) J. MARCALLINO,  
Clerk. **[82]**

**[Minutes—November 7, 1913.]**

Friday, November 7th, 1913.

At 9 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,  
Second Judge Presiding.  
JOHN MARCALLINO, Clerk.  
H. R. JORDAN, Stenographer.

L. 7783.

**ACTION TO QUIET TITLE.**

FRED HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

**CONTINUANCE.**

W. B. LYMER, Esq., Appearing for Plaintiff.

R. J. O'BRIEN, Esq., Appearing for Defendant.

The Court orders this cause continued for further  
argument on the motion for a nonsuit till Wednes-  
day, November 12, 1913, at 9:30 A. M.

By the Court.

(Signed) J. MARCALLINO,

Clerk. [83]



**[Minutes—November 12, 1913.]**

Wednesday, November 12th, 1913.

At 9 o'clock A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,

Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

L. 7783.

**ACTION TO QUIET TITLE.**

**FRED HARRISON,**

Plaintiff,

vs.

**R. W. DAVIS,**

Defendant.

**FURTHER ARGUMENT ON MOTION FOR A  
NONSUIT.**

W. B. LYMER, Esq., Appearing for Plaintiff.

E. C. PETERS, Esq., Appearing for Defendant.

Mr. Peters argues, concluding at 9:25 A. M.

Mr. Lymer argues, concluding at 10:25 A. M.

Mr. Peters replies, concluding at 10:54 A. M.

Mr. Lymer replies, concluding at 11:09 A. M.

Mr. Peters replies, concluding at 11:18 A. M.

The Court takes matter under advisement and orders further hearing continued till Friday, November 14, 1913, at 9 A. M.

By the Court.

(Signed) J. MARCALLINO,

Clerk. [84]

[**Minutes—November 17, 1913.**]

Monday, November 17th, 1913.

At 9 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,

Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

L. 7783.

**ACTION TO QUIET TITLE.**

F. HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

**FURTHER EVIDENCE.**

Counsel for the parties are present in court.

Mr. Lymer presents motion and argues, concluding at 2:14 P. M.

Mr. Peters argues, concluding at 2:30 P. M.

Mr. Lymer replies, concluding at 2:44 P. M.

The Court grants the motion.

Mr. Peters notes an exception and moves that the Court reconsider the motion and deny the same on the ground that no specific evidence is offered.

The Court vacates and sets aside its order heretofore made and orders that the motion to reopen is granted and counsel will be permitted to put in evidence in that certain case being Equity No. 1828 and supplement the same by the testimony of plain-

tiff showing or tending to show that the condition existing at the time of filing the answer existed at the time of bringing this case.

The Court orders further hearing herein set for Wednesday, November 19th, 1913, at 2 P. M.

By the Court.

(Signed) J. MARCALLINO,  
Clerk. [85]

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**[Minutes—November 19, 1916.]**

Wednesday, November 19th, 1913.

At 9 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,  
Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

2 P. M.

L. 7783.

**ACTION TO QUIET TITLE.**

F. HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

**TRIAL CONTINUED.**

Counsel for the parties are present in court.

Mr. Lymer offers in evidence Equity Record #1828 all the files and directing the Court's particular attention to the answer of R. W. Davis. Re-

ceived in evidence over the objection of Mr. Peters.  
Fred Harrison is recalled.

Mr. Lymer offers in evidence Law record #7695,  
C. Brown, Trustee, vs. R. W. Davis. Received in  
evidence.

3 P. M. The Court takes matter under advise-  
ment.

By the Court.

(Signed) J. MARCALLINO,  
Clerk. [86]

**[Minutes—March 14, 1914.]**

Saturday, March 14th, 1914.

At 9 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,  
Second Judge Presiding.  
JOHN MARCALLINO, Clerk.  
H. R. JORDAN, Stenographer.

L. 7783.

**ACTION TO QUIET TITLE.**

FRED HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

**PLAINTIFF'S MOTION TO SET.**

W. B. LYMER, Esq., Appearing for Plaintiff.

E. C. PETERS, Esq., Appearing for Defendant.

The Court grants the motion and orders this cause  
set for trial for Thursday, April 2d, 1914 at 9 A. M.

By the Court.

(Signed) J. MARCALLINO.

[Minutes—April 8, 1914.]

Wednesday, April 8th, 1914.

At 8:40 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,

Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant. [87]

CONTINUANCE.

Counsel for the parties are present in court.

The Court orders this cause continued and reset for further trial for Monday, April 13th, 1914, at 2 P. M.

By the Court.

(JOHN MARCALLINO),

Clerk. [88]



**[Minutes—April 13, 1914.]**

Monday, April 13th, 1914.

At 8:30 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,

Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

L. 7783.

**ACTION TO QUIET TITLE.****FRED HARRISON,**

Plaintiff,

vs.

**R. W. DAVIS,**

Defendant.

**FURTHER TRIAL.**

Counsel for the parties are present in court.

George C. Kopa, sworn.

Robert W. Davis, sworn.

3:50 P. M. The Court orders further trial herein continued till Thursday, April 16th, 1914, at 9 A. M.

By the Court.

(Signed) J. MARCALLINO.

Clerk.

[Minutes—April 16, 1914.]

Thursday, April 16th, 1914.

At 10 o'clock A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,

Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer. [89]

L. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

TRIAL CONTINUED.

Counsel for the parties are present in court.

R. W. Davis, resumes the stand.

The Court denies defendant's motion for a nonsuit.

Mr. Peters notes an exception.

Mr. Peters offers in evidence, complaint in the case of C. Brown, Tr., vs. R. W. Davis, Equity #1828.

Received in evidence.

10:14 A. M. Defendant rests.

Mr. Lymer moves for judgment on the ground first, defendant in this case has not adduced sufficient evidence to meet the *prima facie* case established by plaintiff, and on the specific ground that the deed from Davis to Sumner dated January 1st, 1906, as well as the mortgage from Davis to Sumner dated Jan. 2d, 1906, are neither of them proper evidence

in this case, the deed and mortgage not showing or tending to show any defect in plaintiff's title to an undivided one-half of title *to an undivided one-half of title* to the term of years and being no defense which can be urged and further the deed and mortgage are not available to defendant, defendant being estopped to introduced evidence of this character, to wit, evidence of title to the rights to the land in Mokapu outstanding in a stranger or any evidence whatever of conveyance which have the trust deed as the source from which the title passed.

Counsel for the parties stipulate and agree to submit the motion to the Court on briefs.

By the Court.

(Signed) J. MARCALLINO,  
Clerk. [90]

[Minutes—April 27, 1914.]

Monday, April 27th, 1914.

At 9 A. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,

Second Judge Presiding.

JOHN MARCALLINO, Clerk.

*JOHN MARCALLINO, Clerk.*

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

R. W. DAVIS,

Defendant.

FURTHER TRIAL.

Counsel for the parties are present in court.

Mr. Lymer withdraws his motion for judgment and states that he desires to proceed with further evidence.

George C. Kopa, is recalled.

A. V. Gear, sworn.

4 P. M. The Court orders further trial herein continued til 2 P. M. to-morrow.

By the Court.

(Signed) J. MARCALLINO,  
Clerk. [91]

[Minutes—April 28, 1914.]

Tuesday, April 28th, 1914.

At 2 P. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,  
Second Judge Presiding.

JOHN MARCALLINO, Clerk.

H. R. JORDAN, Stenographer.

L. 7783.

ACTION TO QUIET TITLE.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

FURTHER TRIAL.

Counsel for the parties are present in court.

On motion of Mr. Lymer, the Court orders the name of B. S. Ulrich entered of record as associate

counsel for the plaintiff.

A. V. Gear resumes the stand.

Counsel for the parties argues on the admissibility of certain evidence and agree to submit the matter on briefs. Counsel for defendant to file his brief within 3 days thereafter and counsel for defendant to file a reply brief within two days thereafter.

By the Court.

(Signed) J. MARCALLINO,  
Clerk. [92]

**[Minutes—June 23, 1914.]**

Tuesday, June 23d, 1914.

At 2 P. M. the court convenes.

Present: Honorable WILLIAM L. WHITNEY,  
Second Judge Presiding.  
JOHN MARCALLINO, Clerk.  
H. R. JORDAN, Stenographer.

L. 7783.

**ACTION TO QUIET TITLE.**

**FRED HARRISON,**

Plaintiff,

vs.

**R. W. DAVIS,**

Defendant.

**FURTHER TRIAL.**

W. B. LYMER, Esq., Appearing for Plaintiff.

E. C. PETERS, Esq., Appearing for Defendant.

Mr. Lymer moves to amend the prayer of the complaint to read as follows:

“WHEREFORE plaintiff prays that defendant be summoned to appear and answer this complaint



at the January, 1913, term thereof, unless sooner disposed of by judicial authority; that defendant may be required to set up any adverse claim which he may have in and to said undivided half of said term of years in said land; that defendant be forever barred from all claim and/or interest in said described undivided half of said term of years; that the title to said undivided half of said term of years may be quieted and the plaintiff's ownership therein may be confirmed, and that plaintiff be awarded his costs herein."

Mr. Peters objects to motion. The Court grants the motion. Mr. Peters notes an exception.

Mr. Lymer moves for judgment.

The Court orders judgment entered for the plaintiff for an undivided [93] one-half for a term of years as set out in the complaint.

Mr. Peters notes an exception to the decision as being contrary to the law and the evidence and the weight of the evidence.

By the Court.

(Signed) J. MARCALLINO,

Clerk. [94]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

EJECTMENT—L. No. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Defendant's Bill of Exceptions.**

BE IT REMEMBERED: That the within action at law to quiet the title of a term of years of and to the land of "Mokapu" came on for hearing before the Honorable William Whitney, Second Judge of this court, on Friday, October 17, 1913, jury waived.

The following proceedings were had:

George C. Kopa, a clerk in the office of the registrar of conveyances, produced and there was admitted in evidence a certain deed of trust from John K. Sumner to Bruce Cartwright (see Tr. I\*, p. 2), dated the 16th day of August, 1892, and on the 17th day of August, 1892, recorded in the office of the registrar of conveyances of the Territory of Hawaii, in liber 136, pp. 136-7, wherein and whereby the trustor conveyed the land or "Mokapu" (the same land subject to term of years to which title is sought to be quieted in this action) in trust—

"In the first place, to pay the rents, issues and profits arising therefrom or thereat so long as the lease now in existence is in force to me, the said party of the first part, and upon the expiration of the present lease or other sooner termination thereof to pay the rents, issues and profits arising from or out of said land to my nephew, Robert Wyllie Davis, during the term of his natural life, or in the discretion of said Robert

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(\*The transcript, by reason of a previous appeal, is in two sections, and, hence, the use of the Roman numerals indicating same.) [95]

Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing and agricultural purposes. And, in the second place, from and after the death of said Robert Wyllie Davis, to convey the said premises to the heirs of the body of said Robert W. Davis, lawfully begotten, and, failing such heirs of his body, then to the wife, if living, of the said Robert W. Davis; and, failing such wife, then to convey the said premises unto the heirs at law of the said Robert W. Davis, share and share alike."

#### EXCEPTION NO. 1.

Mr. Kopa having been requested to turn to the records of his office and state what was recorded in liber 343, page 347 (Tr. I, p. 5), counsel for plaintiff, in lieu thereof, offered in evidence a certified copy of a lease dated June 1, 1910, from J. D. Holt, Trustee, to A. V. Gear, of the land described in the Sumner trust deed, with attached undated consent thereto by Robert Wyllie Davis, and mesne assignments thereof by said Gear to Charles F. Peterson, dated October 12, 1910, from the latter to Addie B. Gear, dated October 12, 1910, and from Addie B. Gear to the plaintiff Harrison, dated October 21, 1910. Said lease, consent and mesne assignments were recorded as aforesaid on May 6, 1911.

This offer was objected to by defendant as incompetent, irrelevant and immaterial, and not tending to prove any of the issues in the case, and on the further ground that said Holt named as trustee was

not a trustee, but a pretended or fictitious trustee, and that he had no authority in law to give such a lease.

The ruling on this objection was reversed by the Court and the paper marked for identification as exhibit "A" (Tr. [96] I, p. 6).

Plaintiff, on cross-examination, admitted that the said assignment to him by Addie B. Gear, was given by way of mortgage to secure plaintiff as endorser of certain notes from A. V. Gear, her husband, to John K. Sumner (Tr. p. 9).

Thereafter, the several papers, comprising Plaintiff's Exhibit "A" for identification, were admitted in evidence, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. I, p. 19).

#### EXCEPTION NO. 2.

Further, on cross-examination of plaintiff, the record of his foreclosure proceedings against A. V. Gear and Addie B. Gear (Ex. No. 1814, First Circuit Court), as well as the security agreement between him and Mrs. Gear, dated October 24, 1910 (Defendant's Exhibit 1), having been admitted in evidence, he was asked whether or not he was the same Fred Harrison named as mortgagee in a purported mortgage given by A. V. Gear, dated the 16th of November, 1910, and upon which the proceedings in Equity Case No. 1814 were predicated, which question was objected to by plaintiff's counsel on the ground that the same was not proper examination, which objection was sustained by the Court, to which ruling of the Court defendant duly excepted and said exception



was allowed (Tr. p. 10). The instrument offered by defendant was received for identification and marked Defendant's Exhibit 2 for identification (Tr. p. 10).

### EXCEPTION NO. 3.

The plaintiff was further asked on cross-examination whether or not he was the same person named in the certain chattel mortgage from Addie B. Gear to Fred Harrison, dated June 9, 1911, connected with his foreclosure proceedings [97] against A. V. Gear and Addie B. Gear, his wife, No. 1814, equity division, and recorded in liber 351, page 121. The question was:

“I want to call your attention to another document connected with this Equity Case 1814, dated the 9th day of June, 1911, and recorded in liber 351, page 121, between A. V. Gear and wife and Fred Harrison named in that particular document.”

This question was objected to by plaintiff as not proper cross-examination, which objection was sustained by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. p.11).

### EXCEPTION NO. 4.

The witness was further asked the following question on cross-examination:

Q. I will ask you if you are the same Fred Harrison named in a certain foreclosure deed, Fred Harrison, by Cecil Brown, on the 29th of February, 1912, and recorded in liber 366, page 140?



This question was objected to by plaintiff on the ground that the same was not proper cross-examination. Objection sustained by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed.

#### EXCEPTION NO. 5.

On redirect examination of the same witness, it appearing that Defendant's Exhibit 1 referred to certain notes which the plaintiff had endorsed and for whose security the conveyance, evidenced by Defendant's Exhibit 1, had been made, was asked the following question:

Q. I will ask you whether or not the notes referred to in exhibit 1, for which the security assignment was purported to be made,—whether or not those notes were paid by A. V. Gear?

To this question defendant objected upon the ground that the same was immaterial and not proper redirect examination, but the objection was overruled by the Court. To this ruling [98] of the Court defendant duly excepted and said exception was allowed (Tr. I, p. 14).

#### EXCEPTION NO. 6.

The witness' attention on redirect was then called to a paper dated June 6, 1913, purported to be an assignment signed by Addie B. Gear, and asked whether his signature was appended thereto, which question defendant objected to on the ground that the same was incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in the case (Tr. I. p. 14). This objection was over-

ruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. p. 15).

#### EXCEPTION NO. 7.

Thereupon counsel for plaintiff offered in evidence agreement between Addie B. Gear and Fred Harrison, dated June 6, 1913, to which defendant objected on the ground that the same was incompetent, irrelevant and immaterial. This objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed.

Document so offered, was received and marked Plaintiff's Exhibit "C" (Tr. p. 15).

#### EXCEPTION NO. 8.

Thereupon plaintiff offered in evidence a deed from Cecil Brown, Trustee, to Fred Harrison, dated June 9, 1913, the record in Equity Case No. 1293, and the lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and an assignment of lease from A. V. Gear to Robert W. Davis dated June 16, 1910, to all of which defendant objected on the ground that the same was incompetent, irrelevant and immaterial, which objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed. [99]

#### EXCEPTION NO. 9.

Further, plaintiff offered in evidence assignment of A. V. Gear to Davis, the defendant, dated June 16, 1910, of an undivided one-half interest in and of his lease of "Mokapu," to which offer defendant objected on the ground that the same was incompetent,

irrelevant and immaterial and did not prove or tend to prove any of the issues in the case. This objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. I, p. 19).

The instrument was admitted as Plaintiff's Exhibit "E."

#### EXCEPTION NO. 10.

Plaintiff having rested, defendant moved for a nonsuit upon the following grounds:

1. That the plaintiff had failed to show, nor was there any evidence tending to show, that the plaintiff was entitled to an undivided half for a term of years until June, 1935, of the land of Mokapu, as set forth in paragraph one of the complaint;

2. That the plaintiff had failed to show and there was no evidence, either competent or otherwise, tending to show that he had any interest in the land known as Mokapu aforesaid;

3. That the alleged and pretended appointment of one John D. Holt, or John D. Holt, Jr., by a Judge of the Circuit Court of the First Circuit, was null and void, in this that the Circuit Court was without jurisdiction to make such appointment; and

4. That it affirmatively appeared from the evidence that at the time of the execution of the alleged lease to the plaintiff, the defendant was possessed of a life estate [100] in the land so referred to as "Mokapu," free and clear from any and all trusts (Tr. p. 21).

The motion for a nonsuit was taken under advisement by the Court.

Thereafter, and while the motion for nonsuit was pending, upon motion made by plaintiff further evidence was permitted to be introduced by plaintiff (Tr. I, p. 27), to wit, permitted to put in evidence Equity Case No. 1828 (an action for partition brought by Cecil Brown, Trustee, v. Robert W. Davis, to partition the term of years subject to this action), and supplement the same by the testimony of the plaintiff, showing or tending to show that the condition existing at the time of filing the answer in that case existed at the time of bringing this case (Tr. I, p. 27).

#### EXCEPTION NO. 11.

Thereupon, plaintiff offered in evidence the files in case No. 1828, equity division of the Circuit Court of the First Judicial Circuit of this Territory, to which offer defendant objected on the ground that the same was incompetent, irrelevant and immaterial (Tr. I. p. 27), and not tending to prove or disprove any of the issues in the case. This objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exceptions was allowed (Tr. I. p. 28).

#### EXCEPTION NO. 12.

The plaintiff was then recalled as a witness on his own behalf, and was asked the following question:

“I will ask you this. In this foreclosure proceeding when the time came for a sale to be made, a commissioner’s sale under order of the Court, who bought in whatever interests were foreclosed in this proceeding?

This question was objected to on the ground that



the same was incompetent, irrelevant and immaterial. Objection [101] was overruled, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. pp. 28-29).

#### EXCEPTION NO. 13.

Further, the witness was asked the following question:

Q. I show you Law No. 7695 of the files of this Circuit Court, Cecil Brown, Trustee, v. Robert Wyllie Davis, and will ask you if that is the suit brought at your instigation to quiet title.

This question was objected to by defendant as immaterial. The objection was overruled, and to the ruling of the Court defendant duly excepted and the exception was allowed. (Tr. I, p. 31).

#### EXCEPTION NO. 14.

Thereupon plaintiff offered in evidence Law No. 7695 and this offer was likewise objected to by defendant as immaterial, but the objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed. (Tr. I, p. 31.)

#### EXCEPTION NO. 15.

Thereupon the witness was asked the further question on direct examination:

Q. In this case, Mr. Harrison, the record shows that on the 27th day of June, 1913, judgment was given for the defendant upon the ground that the plaintiff had asked for a nonsuit in the case. When the nonsuit was granted, what, if anything, further did you do?



This question was objected to by defendant on the ground that the same was immaterial, but the objection was overruled by the Court. To this ruling of the Court defendant duly excepted and said exception was allowed (Tr., p. 31).

Thereafter the Court granted defendant's motion for nonsuit and the judgment for nonsuit was entered in this cause, but said ruling upon review by the Supreme Court was reversed (see 22 Haw. 51) and the cause remitted to the trial Court [102] for further proceedings in conformity with said opinion.

#### EXCEPTION NO. 16.

Thereafter the within cause came on to be heard and the motion of defendant for nonsuit, in conformity with the opinion of the Supreme Court, was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 14).

#### EXCEPTION NO. 17.

George K. Kopa, the same witness hereinbefore referred to as a clerk from the office of the registrar of conveyances, was called as a witness on behalf of defendant and asked to produce liber 302 of his office (Tr. II, p. 1) and state what he found on page 192 thereof. Having responded he found a deed by Robert Wyllie Davis and wife to John K. Sumner, he was asked to read it, but the question was objected to as incompetent, irrelevant and immaterial and upon the further ground that the defendant was estopped from introducing any such deed in evidence (Tr. II, p. 2). This objection was taken un-

der advisement and the ruling thereon reserved, and the answer to the question allowed in subject to being stricken upon announcement of the Court's ruling on the objection.

#### EXCEPTION NO. 18.

The deed referred to is dated the 1st day of January, 1906, and was recorded on March 4, 1908. It purports to convey to John K. Sumner for and in consideration of the sum of \$2,794.93, the undivided one-half ( $\frac{1}{2}$ ) share and interest of the grantor in and to the land known as Mokapu, described particularly in the same manner as in the trust deed. Mrs. Davis, the wife of the grantor, also joined in the deed by way of release of all her right of and to dower (Tr. II, pp. 2, 3 and 4). [103]

Further, the same witness, on direct examination, was directed to liber 303 in his office, at page 91 (Tr. II, p. 4), and asked by defendant what the record disclosed. The witness answered that it disclosed a mortgage from Robert W. Davis and his wife, dated January 2, 1906, and recorded on March 4, 1908, wherein and whereby mortgagor conveyed by way of mortgage to John K. Sumner, all his undivided one-half ( $\frac{1}{2}$ ) share and interest in and to the land of Mokapu, described by metes and bounds, to the same effect as contained in the trust deed above referred to. (Tr. II, pp. 4, 5.) This evidence was also objected to by plaintiff on the ground that it was incompetent, irrelevant and immaterial, and upon the further ground that defendant was estopped from introducing such mortgage in evidence,

and the objection taken under advisement and ruling reserved.

These objections were subsequently sustained by the Court, to which rulings of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 36).

#### EXCEPTION NO. 19.

Robert Wyllie Davis, the defendant, was called as a witness in his own behalf. He was asked the following question on direct examination:

Q. You are named the mortgagor in a certain mortgage from yourself and wife to John K. Sumner, dated the 2d day of January, 1906, recorded in liber 303 at page 91. I will ask you whether or not you have ever paid up the amount secured by that mortgage.

To this question plaintiff objected on the ground that the same was incompetent, irrelevant and immaterial, and the defendant was estopped from introducing any such papers in evidence. The ruling on this objection was reserved by the Court to be taken up with the objections to the deed and mortgage theretofore reserved, but subsequently, the objection [104] was sustained, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 7).

#### EXCEPTION NO. 20.

A. V. Gear was called as a witness by the plaintiff in rebuttal. He testified on direct that he was acquainted with the land of Mokapu, and first took it up in a business way in the latter part of 1909,—either September or October (Tr. II, pp. 24-25).

That he proceeded to actually occupy the premises at that time under an agreement with Mr. Davis, and so continued until about the middle part of 1911 (Tr. II, pp. 25-26).

Thereupon the witness was asked the following question on direct examination.

Q. Were you still working under the agreement with Wyllie Davis at the time you took this 25-year leasehold? (Tr. II, p. 27.)

This question was objected to by defendant on the ground that the same was incompetent, irrelevant and immaterial, but the objection was overruled by the Court. To this ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 27).

#### EXCEPTION NO. 21.

The witness answered the question as follows:

A. The agreement was cancelled coextensively with the issuing of the 25-year lease. There were two agreements that I had with Mr. Davis that I was working under, and the consideration of the execution of the lease was the cancelling of the agreements,—the terms of—

Thereupon defendant moved to strike out the answer, as it appeared that the witness was testifying in respect to two agreements, the contents of which were unknown.

This motion was denied by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 27). [105]

#### EXCEPTION NO. 22.

Further, the witness was asked on direct examina-



tion the following question:

Q. And these agreements you have spoken of were entered into between yourself and Mr. Davis. Were you, Mr. Gear, ever present at any conversation between Wallie Davis and Sumner when the matter of Davis' deeding over his interest to Sumner was discussed (Tr. II, p. 27)?

This question was objected to on the ground that there were not any agreements in evidence and the time laid was indefinite. This objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 27).

#### EXCEPTION NO. 23.

The witness, having stated that he was present at such a conversation, was asked the following question:

Q. I will change that by saying, state what was discussed by Sumner and Davis in regard to the ownership of Mokapu.

This question was objected to as irrelevant, incompetent and immaterial, not tending to prove or disprove any of the issues of this case and calling for a conclusion of the witness.

This objection however, was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 29).

#### EXCEPTION NO. 24.

The witness having testified that Mr. Sumner asked Mr. Davis and his wife to deed him the land



of Mokapu to which they objected and left, he was asked the further question:

Q. Just answer "Yes" or "No" to this question. Did you ever know from Wallie Davis' own lips, his own statement, as to the real intent and meaning of this deed of January 1, 1906, of one-half of Mokapu to John K. Sumner, a deed absolute on its face? [106]

This question was objected to by defendant on the ground that the same was incompetent, irrelevant and immaterial and indefinite. The objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 29).

#### EXCEPTION NO. 25.

The witness having answered in the affirmative, he was asked the following question:

Q. Will you state what that statement was?

To this question defendant objected on the ground that the same was incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case, but the objection was overruled, To this ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 30).

#### EXCEPTION NO. 26.

The witness having responded that Mr. Davis declared that the deed to John K. Sumner was given by way of security, the witness was asked the further question on direct (Tr. II, p. 31):

Q. Let me ask you, Mr. Gere, did Mr. Davis at this interview you have spoken of when he

spoke of giving Mokapu as security, did he mention anything about the amount of the advances which he had secured?

To this question defendant objected on the ground that the same was incompetent, irrelevant and immaterial. The objection was overruled by the Court, to which ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 32).

#### EXCEPTION NO. 27.

Further, the witness was asked on direct examination (Tr. II, p. 32). [107]

Q. There is on record here in evidence, Mr. Gere, a sublease, or, rather, an assignment by you of one-half of your interest in and to this 25-year term to Wallie Davis after you took the assignment. I want to ask you whether or not the matter of that assignment of this one-half interest was ever discussed between yourself and Mr. Davis and Mr. Sumner, prior to the time when the 25-year term was created in 1910.

This question was objected to by defendant on the ground that the same was incompetent, irrelevant and immaterial, but the objection was overruled by the Court. To this ruling of the Court defendant duly excepted and said exception was allowed (Tr. II, p. 32).

#### EXCEPTION NO. 28.

Both parties having rested, thereafter, on June 23, 1914, defendant asked for an amendment of the prayer in this complaint, the same to read as follows:

“Wherefore, plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term thereof, unless sooner disposed of by judicial authority; that the defendant may be required to set up in the traverse any claim he may have in and to the undivided half of said term of years in said land; that defendant be forever barred from any claim to and of interest in said described undivided half of said term of years and that said undivided half of said term of years may be quieted and that the plaintiff’s ownership therein may be confirmed and the plaintiff herein awarded his costs herein.”

To this motion defendant objected on the ground that the request came too late, which objection of the defendant was overruled by the Court, and an exception allowed the defendant and the motion to amend granted.

#### EXCEPTION NO. 29.

Thereafter, the Court orally found for the plaintiff for an undivided half of the term of years set out in the complaint, to which defendant excepted on the ground that the decision of the Court was against the law and the evidence and the weight of the evidence, and said exception was allowed.

[108]

#### EXCEPTION NO. 30.

Thereafter and on, to wit, the 25th day of June, 1914, the Court’s decision in writing in favor of plaintiff and against defendant was filed herein, to

which ruling of the Court defendant duly excepted on the ground that the same was contrary to law and the evidence and the weight of the evidence.

And thereafter and on to wit, the 26th day of June, 1914, judgment of the Court was entered and filed in favor of plaintiff and against defendant as prayed by the amended complaint, to which judgment defendant excepted on the ground that the same was contrary to law and the evidence and the weight of the evidence.

There is hereby made a part of the within bill of exceptions by reference, plaintiff's complaint, plaintiff's amended complaint, defendant's answer, judgment of nonsuit, remittitur of the Supreme Court upon review of judgment of nonsuit, plaintiff's and defendant's exhibits, including Plaintiff's Exhibits "A," "C," "D" and "E," and the records of the First Circuit Court in Equity No. 1293, Equity No. 1828 and Law No. 7695, and Defendant's Exhibit 2, 1 for identification and record in Equity No. 1814, order for transcript of evidence, transcript of the evidence, decision on merits, judgment, exception to judgment, all orders pertaining to the service and presentation of defendant's proposed bill of exceptions, including the orders of July 1 and August 24, respectively, and all clerk's minutes, records, papers, pleadings, documents, exhibits and files in the within cause; and defendant prays that upon settlement and allowance of the within exceptions, the same may be made a part hereof by reference.



Dated this 14th day of September, A. D. 1914.

E. C. PETERS,

Attorney for Defendant. [109]

**[Order Settling, etc., Bill of Exceptions.]**

The foregoing bill of exceptions being found conformable to the truth, is hereby allowed, and the prayer thereof is granted, and there is hereby made a part of the within bill of exceptions by reference, plaintiff's complaint, plaintiff's amended complaint, defendant's answer, judgment of nonsuit, remittitur of the Supreme Court upon review of judgment of nonsuit, plaintiff's and defendant's exhibits, including Plaintiff's Exhibits "A," "C," "D" and "E," and the records of the First Circuit Court in Equity No. 1293, Equity No. 1828 and Law No. 7695, and Defendant's Exhibit 2, 1 for identification and record in Equity No. 1814; order for transcript of evidence, transcript of the evidence, decision on merits, judgment, exception to judgment, all orders pertaining to the service and presentation of defendant's proposed bill of exceptions, including the orders of July 1 and August 24, respectively, and all clerk's minutes, records, papers, pleadings, documents, exhibits and files in the within cause.

November 6, 1914.

WM. L. WHITNEY,

Judge.

Service of the within Defendant's Bill of Excep-



tions is hereby admitted this 14th day of Sept. A. D. 1914.

THOMPSON, WILDER, MILVERTON &  
LYMER,

W. B. L.,

Attorneys for Plaintiff.

[Endorsed]: L. No. 7783. Circuit Court, First Circuit Territory of Hawaii. Fred Harrison vs. Robert W. Davis. Defendant's Proposed Bill of Exceptions. Presented Sept. 14th, at 6:30 P. M. Wm. L. Whitney, Second Judge. Filed Nov. 6, 1914, at 11 A. M. J. Marcallino, Clerk. E. C. Peters, 210-211 McCandless Building Honolulu, T. H., Attorney for —.

No. 814. Received and filed in the Supreme Court November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [110]

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#381.

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

ACTION TO QUIET TITLE.

LAW NO. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

Circuit Court, Jan. 13, 1914. First Jud. Circuit.

**Transcript.**

**APPEARANCES.**

For Plaintiff: Messrs. THOMPSON, WILDER,  
WATSON & LYMER,

For Defendant: EMIL C. PETERS, Esq.

HERBERT R. JORDAN, Official Reporter.

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

**ACTION TO QUIET TITLE.**

**LAW 7783.**

**FRED HARRISON,**

**Plaintiff,**

**vs.**

**ROBERT WYLLIE DAVIS,**

**Defendant.**

**TRANSCRIPT.**

On Friday, the 17th day of October, 1913, at the  
hour of 9:30 o'clock A. M., the above cause coming

on for trial before the Honorable William L. Whitney, Second Judge of the above-entitled Circuit Court, William B. Lymer, Esquire, of the firm of Messrs. Thompson, Wilder, Watson & Lymer, appearing for the plaintiff herein, and Emil C. Peters, Esquire, appearing for the defendant, the following proceedings were had and testimony taken:

(Demand for jury trial waived by both parties.)

(Counsel for plaintiff read complaint.)

**[Testimony of George C. Kopa, for Plaintiff.]**

GEORGE C. KOPA, a witness for the plaintiff, was duly sworn, and testified as follows:

**Direct Examination.**

(By WILLIAM B. LYMER, Esq.)

Q. You are identified with the record office of the Territory of Hawaii?     A. Yes, sir. **[113]**

Q. And have been for a number of years last past?  
A. Yes.

Mr. LYMER.—You will admit his qualifications to testify on the records, Mr. Peters?

Mr. PETERS.—Yes.

Q. Have you in your hand Liber 136 of the records of the registrar's office?     A. Yes, sir.

Q. Will you turn to page 313 of Book 136 and state to the Court what instrument is there recorded?

A. (Witness examines book mentioned.) I find a trust deed given by John K. Sumner to Bruce Cartwright, dated August 16, 1892.

Mr. LYMER. May I suggest that I furnish the stenographer with a typewritten copy of this and

(Testimony of George C. Kopa.)

have it considered as though read in evidence.

Mr. PETERS.—No objection.

The following is the trust deed referred to, as recorded in Liber 136, pp. 136–7.

**[Trust Deed, August 16, 1892, John K. Sumner to  
Bruce Cartwright.]**

**“JOHN K. SUMNER to BRUCE CARTWRIGHT.  
TRUST DEED.**

**“Stamped \$1.00.**

“THIS INDENTURE, made this 16th day of August, A. D. 1892, between John K. Sumner of Tahiti, but at present residing in Honolulu in the Island of Oahu, the party of the first part, and Bruce Cartwright of said City of Honolulu, the party of the second part, WITNESSETH: That the said party of the first part, for and in consideration of the sum of one dollar, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, and by these presents does grant, bargain, and sell unto [114] the said party of the second part that certain piece or parcel of land situate, lying, and being in the District of Koolaupoko, Island of Oahu, and known as Mokapu, more particularly described as follows: Commencing at the hala tree on the sea coast marked on the plan the boundary runs along that of the land of Kaneohe North 54° 54', East 6990 six thousand, nine hundred and ninety feet; thence North 23° 45', West 1664 one thousand, six hundred and sixty-four feet to sea coast (thence round sea

coast) as shown on plan, to commencement, and containing an area of 434-6/10 acres, and being the same premises conveyed to William and John Sumner by deed of record in Liber 7 on pages 356 & 357. Together with all and singular the easements, tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion or reversions, remainders or remainder, rents, issues, and profits thereof, and also all the estate, right, title and interest thereon or thereto. **TO HAVE AND TO HOLD** the same unto the said party of the second part and his heirs and assigns forever; but in trust, nevertheless, for the uses and purposes herein set forth, that is to say: In the first place, to pay the rents, issues, and profits arising therefrom or thereat so long as the lease now in existence is in force to me, the said party of the first part, and upon the expiration of the present lease or other sooner termination thereof to pay the rents, issues, and profits arising from or out of said land to my nephew, Robert Wyllie Davis, [115] during the term of his natural life, or in the discretion of said Robert Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing and agricultural purposes. And, in the second place, from and after the death of said Robert Wyllie Davis, to convey the said premises to the heirs of the body of said Robert W. Davis, lawfully begotten, and, failing such heirs of his body, then to the wife, if living, of the said Robert W. Davis; and, failing such wife, then to convey the



said premises unto the heirs at law of the said Robert W. Davis, share and share alike.

IN WITNESS WHEREOF I have hereunto set my hand and seal the day and year first above written.

“JOHN K. SUMNER.

“In the presence of

C. F. PETERSON.

“Hawaiian Islands,

Island of Oahu,—ss.

“On this 16th day of August, A. D. 1892, personally appeared before me John K. Sumner, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein set forth.

“CHARLES F. PETERSON,

Notary Public.

“Recorded and compared this 17th day of August, A. D. 1892, at 2:11 o'clock P. M.

(Signed) MALCOLM BROWN,

Deputy Registrar of Conveyances.”

Mr. PETERS.—The Court will bear in mind that the rents, issues, and profits shall be paid to Davis, for life, or, in lieu thereof, to permit him at his discretion to reside upon said [116] premises and while so residing to use the same for agricultural and grazing purposes, and then, upon his death, if the Court please, to convey the said premises over to the lawfully begotten heirs of his body, and, fail-

(Testimony of George C. Kopa.)

ing which, to his wife, if any; failing which, to his heirs at law.

Mr. LYMER.—It is considered read in evidence?

Mr. PETERS.—It is considered read in evidence.

Mr. LYMER.—I have in my hand Equity No. 1293 to show the substitution of John B. Holt, Jr., as trustee, in place of Bruce Cartwright. Will you admit those are the official files of the Circuit Court of this Circuit?

Mr. PETERS.—I will admit that they are, but I don't admit their relevancy or competency. We object, if the Court please, and respectfully suggest that the objection be reserved to be taken up with the Court on the merits. We object to the introduction of the record on the ground that the Honorable George V. Gear, the Second Judge of the Circuit Court, was without jurisdiction to appoint a trustee or any substitute trustee, and that the order is wholly null and void, on the ground that at the time of the alleged order there had been vested in Robert Wyllie Davis, the beneficiary named in the trust deed a life estate absolute to the premises.

(File in Equity No. 1293 marked for identification, subject to a ruling of the Court on its admissibility later.)

Q. Mr. Kopa, turn to Book 343 of the records of the Hawaiian registrar's office and state what is there recorded, page 347. A. (No answer.)

Mr. LYMER.—By consent of counsel, in place of getting the most direct evidence, I should like to

(Testimony of George C. Kopa.)

file the document I have in my hand, counsel agreeing that it represents the [117] records contained in Liber 343 at pages 347-351 of the registrar's records, purporting to be a conveyance of lease from A. V. Holt, Trustee, to A. V. Gear of the land described in the Sumner trust deed, and following thereafter a consent by Robert Wyllie Davis to the lease, and following thereafter certain conveyances: first, by Gear to Charles F. Peterson; then from Peterson to Addie B. Gear; and thereafter an assignment by A. B. Gear to Fred Harrison, plaintiff in this action,—this document being a certified copy, and I offer it subject to objection of counsel.

(Objected to as incompetent, irrelevant, and immaterial, and not tending to prove any of the issues of the case, and on the further ground that said Holt named as trustee was not a trustee, but a pretended or fictitious trustee, and he had no authority in law to give such a lease.) (Ruling reserved, and paper marked for identification as exhibit "A.")

Cross-examination.

(By EMIL C. PETERS, Esq.)

Q. Mr. Kopa, will you produce, please, Libers 302, 336, 366,—

The COURT.—Is this cross-examination, Mr. Peters?

Mr. PETERS.—Of course, if counsel is going to object, that brings up promptly whether or not it is a proper cross-examination. I am inclined to be-

(Testimony of George C. Kopa.)

lieve that it is not cross-examination under the strict ruling.

The COURT.—I am also inclined to that opinion.

(Witness excused.)

Mr. LYMER. As the *record* now stand, assuming that the records are relevant and prove themselves, it shows that Holt [118] succeeded Cartwright as trustee, and then it shows a chain of assignments, finally vesting a half interest in Fred Harrison, but just how A. V. Gear, the first lessee, ceased to hold the entire lease has not been shown. I want counsel to assist me in that. Of course, if I prove that I show my client has the entire lease. I should like to put the entire record before the Court. Mr. A. V. Gear is a necessary witness at this point, if counsel cannot assist me. May I ask for a ruling of the Court on this point?

Mr. PETERS.—It seems to me if you prove that you are entitled to half the Court can only give you half.

Mr. LYMER.—The only way is to offer this assignment in evidence. Mr. Gear was to be here at nine o'clock and it is now about ten and I think the only way to do is to subpoena him.

**[Testimony of Frederick Harrison, for Plaintiff.]**

FREDERICK HARRISON, the plaintiff, was sworn as a witness in his own behalf, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. Mr. Harrison, you are a resident of Honolulu,



(Testimony of Frederick Harrison.)

city and county of Honolulu, Territory of Hawaii, are you?     A. Yes, sir.

Q. Do you know Robert Wyllie Davis, the defendant in this suit?     A. Yes, sir.

Q. Is he also a resident of said Honolulu?

A. Yes, sir; at Kaneohe, on the other side of the island.

Q. On this island and in this territory. Have you any familiarity with certain land known as Mokapu?     [119]     A. Yes, sir.

Q. I hand you a paper marked "Exhibit 'A' for Identification" for plaintiff, showing the lease of certain land at Mokapu known as the land of Mokapu to A. V. Gear. (Handing exhibit for identification to the witness.) By referring to the reference here to the land known as Mokapu and the further reference that it is the land described in the Sumner trust deed, I will ask you whether or not that is an accurate description of the land with which you are familiar?

(Objected to, as no ground has been laid for this examination, and further that it is immaterial.)

(Question withdrawn.)

Mr. PETERS.—What is the purpose of this examination? I cannot appreciate the purpose. I don't see how Mr. Harrison's familiarity with the land is material.

Q. This document marked "Exhibit 'A' for Identification,"—the last assignment contained therein, immediately preceding the verification of the registrar, certification of the registrar, purports to be an



(Testimony of Frederick Harrison.)

assignment made November 15, 1910, from Addie B. Gear to Fred Harrison. I will ask you whether or not you are the Fred Harrison named in that assignment. A. Yes, sir.

Q. You are the assignee of that assignment?

A. Yes, sir.

Q. Did you pay a valuable consideration for that assignment? A. I did.

Q. Have you ever conveyed away that land, Mr. Harrison?

(Objected to as immaterial, except to the defendant to show that he has conveyed it away.) [120]

(Objection sustained.)

Cross-examination.

(By EMIL C. PETERS, Esq.)

Q. This particular assignment of lease from A. V. Gear to yourself was given by way of security, was it not? A. Yes.

Q. And was, in fact, a mortgage, was it not?

(Objected to as calling for a conclusion of law.)

(No ruling.)

A. I don't know as it was a mortgage. It was part of my security for endorsing certain notes.

Q. For endorsing certain notes from A. V. Gear to John K. Sumner? A. Yes.

Q. And, Mr. Harrison, you are the same Fred Harrison that is named in a certain equity action lately pending in the Circuit Court of the First Circuit, being No. 1814 of the Equity Division, and entitled Fred Harrison against A. V. Gear and Addie B. Gear, his wife?

(Testimony of Frederick Harrison.)

(Objected to as incompetent, irrelevant and immaterial.)

(Argument. Objection overruled.)

A. I am.

Mr. PETERS.—We offer the record in evidence.

(Objected to as incompetent, irrelevant and immaterial.)

(Objection overruled.)

(Record in Equity No. 1814 received in evidence.)

Q. Have you, Mr. Harrison, a certain agreement between yourself and Addie B. Gear, dated the 24th of October, 1910? [121] A. Yes, sir.

Q. Are you the Mr. Fred Harrison named in that particular agreement? A. I am, sir.

(Paper referred to offered in evidence.)

(Received and marked "Defendant's Exhibit 1.")

(Defendant's Exhibit 1 read to the Court.)

Q. Mr. Harrison, will you produce, please, the agreement dated the 16th of November, 1910, between yourself and A. V. Gear?

(Counsel for plaintiff produces document requested.)

Q. Counsel has produced, Mr. Harrison, what purports to be a mortgage, an agreement between yourself and Mr. A. V. Gear. (Handing document to the witness.)

A. (Witness examines the paper.)

Q. Are you the Mr. Harrison named in that particular document?

(Objected to as improper cross-examination.)

(Objection sustained.)

(Testimony of Frederick Harrison.)

Q. You are Fred Harrison, all right?

A. I think so; I wish I wasn't, though.

Mr. PETERS.—We will ask then that the document be marked for identification.

(Document marked "Defendant's Exhibit 2" for identification.)

Q. You are the Fred Harrison named in this document or agreement of November 16, 1910, between yourself and A. V. Gear? (Handing document to the witness.)

A. Yes, sir. [122]

Q. I want to call your attention to another document connected with this Equity Case 1814, dated the 9th day of June, 1911, and recorded in liber 351, page 121, between A. V. Gear and wife and Fred Harrison, and ask you whether or not you are the same Fred Harrison named in that particular document.

(Objected to as not proper cross-examination.)

(Objection sustained. Exception.)

Q. I will ask you if you are the same Fred Harrison named in a certain foreclosure deed, Fred Harrison, by Cecil Brown, on the 29th of February, 1912, and recorded in Liber 366, page 140.

(Objected to as not proper cross-examination.)

(Objection sustained. Exception.)

Redirect Examination.

(By WILLIAM B. LYMER, Esq.)

Q. You have identified on your cross-examination,—that is, my remembrance is that you identified a certain paper as having been executed by you and

(Testimony of Frederick Harrison.)

Mrs. Gear. If I am wrong you tell me. Did counsel hand you that paper? (Handing witness Defendant's Exhibit 1.)

A. Yes, sir.

Q. And you testified that you had signed it?

A. Yes, sir.

Q. Do you know whether or not Mrs. Abbie B. Gear signed the instrument? A. Yes, sir.

Q. Do you know, Mr. Harrison, whether or not the promissory notes, payment of which is mentioned in this exhibit as being a condition for reconveyance of your interest in Mokapu, were ever paid? [123]

(Objected to as incompetent, irrelevant and immaterial and not proper redirect examination.)

(Argument. Objection sustained.)

Q. You have stated in cross-examination that the original assignment of October 21, 1910, by Addie B. Gear of her half interest in Mokapu was merely a security assignment? A. Yes.

Q. Was there any security agreement in writing executed between yourself and Mrs. Gear, or was it purely an oral arrangement that this assignment was merely by means of security?

A. May I see that agreement you have? (Counsel hands document to the witness, and witness examines it.) This is the only agreement I had.

Q. This agreement you had in your hand marked "Defendant's Exhibit 1" you say was the only agreement you had? A. Yes.

Q. Does this agreement, Defendant's Exhibit 1, refer to the assignment of Addie B. Gear?



(Testimony of Frederick Harrison.)

(Objected to, as agreement itself is the best evidence.)

(Objection sustained.)

Q. Do you recall the circumstances surrounding the execution of this security agreement, Mr. Harrison?

(Objected to as immaterial. Argument.)

(Question withdrawn.)

Q. At the time when the assignment of October 24, 1910, from Addie B. Gear, to you, when she assigned the half interest in Mokapu to you, was there at that time any understanding between yourself and Mrs. Gear as to whether the assignment which you said was security was merely a security assignment [124] or an outright assignment?

(Objected to as immaterial, as we are not concerned with the circumstances; but concerned with the instrument as an instrument.)

(Argument. Objection sustained.)

Q. Have you anything further to say in regard to this security agreement between yourself and Mrs. Gear as to what it affected?

(Objected to, as agreement speaks for itself.)

(No ruling.)

A. I can state as far as my knowledge is concerned.

Q. You said some minutes ago, Mr. Harrison, or I asked you whether or not there had been given in writing some written agreement as to the assignment from Mrs. Gear to you being a security assignment, rather than an outright assignment?



(Testimony of Frederick Harrison.)

A. I didn't have a chance to finish my answer to your question. I intended to state not of that date, October 24th, but I knew of some agreements made since that date. This assignment with lease was made over in Mr. Rawlins' office, where we were negotiating in regard to these notes. This agreement was made on the 21st of October, 1910.

Q. Just make a statement as to the facts surrounding the security agreement.

A. Mrs. Gear came to me and asked if I would endorse her notes to Mr. Sumner, and I said I would take the matter up and see Mr. Rawlins, and Mrs. Gear agreed to assign the lease to me under the understanding that I would sign certain notes and under the agreement that we would give the property back if she paid up certain notes, and just an agreement in the meantime while this instrument was being drawn. [125]

Q. Is that agreement you hold in your hand this security agreement, the writing which was delivered in accordance with this understanding? (Referring to Defendant's Exhibit 1.)

A. Yes, sir.

Q. I will ask you whether or not the notes referred to in exhibit 1, for which the security assignment was purported to be made,—whether or not those notes were paid by A. V. Gear.

(Objected to as immaterial and not proper re-direct examination.)

(Objection overruled.)

A. One of them was paid.

(Testimony of Frederick Harrison.)

Q. Was that note you referred to paid by Gear?

(Objected to as irrelevant, incompetent, and immaterial and not proper redirect examination.)

(Question withdrawn.)

Q. Which of these notes was paid?

A. Neither of them was paid.

(Objected to as incompetent, irrelevant, and immaterial and not proper redirect examination.)

(Objection sustained. Exception.)

Q. I have in my hand an assignment or paper dated June 6, 1913, purporting to be signed by Addie B. Gear and ask you at this time whether that is your signature on this? (Handing paper to the witness.)

(Objected to as incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in this case.) [126]

(Argument. Objection overruled. Exception.)

Q. (Question read to the witness by the reporter.)

A. Yes, sir.

Recross-examination.

(By EMIL C. PETERS, Esq.)

Q. Don't you know the signature of Addie B. Gear?

A. I only know it by the way it is signed there. She never signed that in my presence.

Mr. PETERS.—We offer the instrument in evidence.

The COURT.—It cannot be received at this time as an exhibit for the defendant.

Mr. LYMER.—I offer the paper in evidence.

(Testimony of Frederick Harrison.)

(Objected to as incompetent, irrelevant, and immaterial.)

(Objection overruled.)

(Document received and marked "Plaintiff's Exhibit 'C.'")

**[Testimony of William T. Rawlins, for Plaintiff.]**

WILLIAM T. RAWLINS, a witness for the plaintiff, was duly sworn, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. Mr. Rawlins, you have been the attorney of the plaintiff, Mr. Harrison, in this case at sundry times, have you not?     A. I have.

Q. Were you acting as his attorney on or about the month of October, 1910?     A. I was. [127]

Q. I show you first an assignment set out in Plaintiff's Exhibit "A" for identification, purporting to be from Abbie B. Gear to Fred Harrison, dated October 24, 1910, assigning certain interest in the land of Mokapu, and I also show you a paper marked "Defendant's Exhibit 1," and ask you what, if anything, can you say as to the drawing up of those separate instruments?     What were the facts?

A. The facts relative to the drawing up of the instruments were these. Mr. Harrison came to me and stated that Mr. Gear had called on him with reference to he, Harrison, assiting Mr. Gear in meeting certain obligations with John Marcallino, as attorney or agent of John K. Sumner, which he had against Gear, as I understood it, of the result of an

(Testimony of William T. Rawlins.)

accounting. As I understood it, Gear had been substituted by John Marcallino and this matter came to a head in the Circuit Court before Judge Robinson, and Mr. Marcallino was pressing Mr. Gear and Mr. Gear had gone to Mr. Harrison to assist him. The matter was taken up and it was arranged that Mr. Gear should give his notes to John K. Sumner to be endorsed by Harrison. In consideration of the endorsement and assistance rendered by Harrison towards Mr. Gear he was to have Mrs. Gear assign her undivided half interest in the land of Mokapu, held under lease by John V. Holt and conveyed to Mrs. Gear by conveyances, until the notes of Mrs. Gear were paid. That was two or three or four days before the notes were signed, and the notes were signed at that time the arrangement was made. At that time I was Assistant United States District Attorney and my office was in this building. On October 24th, the notes were executed and delivered to Mr. Marcallino in that office, Mr. John K. Sumner present and Mr. Gear and myself. Immediately the question came up in view of the fact of Gear paying [128] the notes the question of whether Harrison would turn it back, and then this security agreement was drawn up on the 24th and then Mr. and Mrs. Gear went on the other side of the island and it was probably two weeks before we could get Mrs. Gear's signature to it, and on the 15th of November, I went up to her house and secured her signature to this instrument. It put in writing what the understanding was between Harrison and Gear as to what



(Testimony of William T. Rawlins.)

this assignment was. It wasn't an out-and-out assignment; all Harrison wanted was security for the payment of these notes. If Gear paid these notes when they became due, that was all Harrison wanted and Harrison would convey the property back, but, it will be noted here, that he should have part of the property even after Harrison had—

Q. Do I understand that the document was not signed on October 24th?

A. I say the document was dated October 24, 1910, was signed by Fred Harrison in my office and acknowledged by A. V. Gear and Mrs. Gear then went on the other side of the island and it took me several visits before I could get Mrs. Gear to sign the document, but finally it was signed by her and acknowledged at her residence. I called there several times and Mrs. Gear was out.

(Cross-examination waived.)

**[Testimony of A. V. Gear, for Plaintiff.]**

A. V. GEAR, a witness for the plaintiff, was duly sworn, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. Mr. Gear, you are familiar with the transaction which took place between yourself and Mrs. Gear and Fred Harrison [129] during the month of October, 1910, relative to the endorsement by Mr. Fred Harrison of certain notes of yours about that time?

A. I am.

Q. Are you acquainted with the facts surrounding



(Testimony of A. V. Gear.)

the assignment by Mrs. Addie B. Gear of the assignment of her interest in the Mokapu lease to Mr. Fred Harrison?     A. I am.

Q. And are you familiar with the facts surrounding the giving of the security agreement?

A. I am.

Q. Will you state the facts surrounding those transactions, particularly the assignment and security agreement.

A. The assignment of the lease was made by way of security to secure an endorsement by Fred Harrison of two notes which we might be compelled to meet, the understanding being that in case Mrs. Gear and myself being able to meet those notes the assignment would be reassigned back to Mrs. Gear. The transaction took two or three days, I think. Mr. Rawlins was very busy as United States District Attorney, and it was difficult to put it through at one sitting. The papers had to be drawn up and looked over and O K'd by myself and by Mrs. Gear, and also by Mr. Harrison. The lease was assigned to Mr. Harrison, and he signed a document whereby he agreed to reassign it in case the notes should be met; I think within one year's time; I don't recollect the exact date, but there was a certain length of time that was given to pay the notes and get the reassignment of the lease.

A. I hand you Defendant's Exhibit 1 and ask you whether or not that was the agreement as to which you have testified, the security agreement, or the re-

(Testimony of A. V. Gear.)

assignment agreement, rather. (Handing Exhibit 1 to the witness.)

A. (Witness examines the document.) That is the agreement, [130]

(Cross-examination waived.)

Mr. LYMER.—I desire to offer in evidence a deed by Cecil Brown, Trustee, dated June 9, 1913, to Fred Harrison of all right, title, and interest in and to the half interest of Addie B. Gear, being that conveyed by deed of Job Batchelor, dated ———. I will also ask the Court to admit the two documents offered in evidence for identification: First, the equity record No. 1293, record of the substitution of John D. Holt, Trustee, in favor of Bruce Cartwright, and then the lease.

The COURT.—That has already been offered and ruling reserved.

Mr. LYMER.—And then finally the deed from A. V. Gear, which was admitted in evidence a moment ago.

(Objected to as incompetent, irrelevant, and immaterial and not proving or tending to prove any point at issue.)

(Objection overruled. Exception.)

(Document referred to received in evidence and marked "Plaintiff's Exhibit 'D.'")

Mr. LYMER.—I should like counsel to admit that the John D. Holt, Jr., Trustee, appearing as lessor, is the one and same as John D. Holt mentioned in Equity 1814.

(Testimony of A. V. Gear.)

Mr. PETERS.—I will admit that.

(Adjourned to the hour of two o'clock P. M. Friday, October 17, 1913.) [131]

At the hour of two-twenty o'clock P. M. on Friday, October 17, 1913, all parties to the action being present in court, the following further proceedings were had and testimony taken:

A. V. GEAR, a witness for the plaintiff, was recalled, and testified as follows:

Direct Examination (Continued).

(By WILLIAM B. LYMER, Esq.)

Q. I hand you a paper which seems to have your signature affixed at the bottom. Is that your signature? (Handing document to the witness.)

A. (Witness examines the document.) It is.

Q. Below that is the signature of John D. Holt. Do you recognize that? A. I do.

Q. Can you state whether or not Mr. Holt signed the paper? A. He did sign the paper.

(Document referred to offered in evidence,—purporting to be an assignment by Mr. Gear at a time when he had all the Mokapu lease of a half interest in the lease to the defendant, Davis.)

(Objected to as incompetent, irrelevant, and immaterial and not proving or tending to prove anything at issue.)

(Objection overruled. Exception.)

(Document offered received and marked "Plaintiff's Exhibit 'E.' ")

(Plaintiff rests.) [132]

(Testimony of A. V. Gear.)

Mr. PETERS.—We move for a nonsuit on the grounds: (1) that the plaintiff has failed to show, nor is there any evidence tending to show, that the plaintiff is entitled to an undivided half for a term of years, until June, 1935, of the land of Mokapu, as set forth in paragraph one of the complaint herein; (2) that the plaintiff has failed to show and there is no evidence, either competent or otherwise tending to show that he had any interest in the land known as Mokapu aforesaid; (3) that the alleged and pretended appointment of one John D. Holt or John D. Holt, Jr., by a Judge of the Circuit Court of the First Circuit was null and void in this: that the Circuit Court was without jurisdiction to make such appointment; and (4) that it affirmatively appears from the evidence that at the time of the execution of the alleged lease to the plaintiff the defendant was possessed of a life estate in the land so referred to as Mokapu, free and clear from any and all trusts.

I should like to argue the first point, if the Court please, as I consider that point decisive.

(Argument.)

The COURT.—I am not ready to decide the merits of the motion for nonsuit at this time.

By stipulation of counsel the following witness was recalled at this time for possible rebuttal:



[Testimony of William T. Rawlins, for Plaintiff  
(Recalled in Rebuttal)].

WILLIAM T. RAWLINS, a witness for the plaintiff, was recalled for possible rebuttal, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.) [133]

Q. You know Robert Wyllie Davis, do you not?

A. I do.

Q. Did you ever have any conversation with Mr. Davis with regard to the land known as Mokapu, in controversy in this suit?

A. Yes; I have had a couple of *conversation* with him about it; one before there was ever any proceedings and one subsequent to the dispute.

Q. Was there anything said by Mr. Davis, the defendant in this action, to you at either of these conversations with reference to any rights that A. V. Gear, the early lessee of this lease, had in that land? Do you remember anything along that line?

A. That was in the first conversation with Mr. Davis; that took place in his house in Kaneohe.

Q. When was this? Can you place it as to time?

A. It was subsequent to the date of that instrument of October 24th. I don't know whether—Subsequent to 1910 and prior to the first of July, 1911, and the occasion of it was this. The Pacific Fish Company, Limited, wanted to secure a lease of the fishing rights at Mokapu and also other fishing rights in Kulau. I went over and saw a man named Darling who lived at Heia, and on the way back



(Testimony of William T. Rawlins.)

from Heia I dropped in on Mr. Davis and he got in about five o'clock, and we had a drink of gin—I was drinking in those days—and I spoke to Mr. Davis relative to these fishing rights. I was under the idea at that time that Mr. Davis controlled the fishing rights and that Gear had nothing to do with it, and he told me at that time, he told me about the transaction between himself and Gear; that Holt had made a lease to Gear and that Gear and he before that time had been in some business [134] in Mokapu and after that Gear gave him *him* a half interest in it, and the conversation went on regarding the anticipated law suit between himself and others—

Q. Just what was this that was said regarding fishing rights by Mr. Davis? Just what did he say?

A. He said he didn't know whether he could give me the fishing rights; also he said, "Gear has also a half interest in that place also." And I spoke to Mr. Davis about signing the lease and he said he didn't know whether he could sign a lease or not; that the whole of Mokapu had been leased by Gear and he didn't have the whole of the fishing rights.

Q. Was there anything in that conversation that had to do with either Mr. Gear's or Mr. Harrison's interest in this Mokapu lease?

A. That was three conversations.

Q. Give the time of the second conversation you had.

A. The second conversation was some time between the first of July, 1911, and the 15th day of Au-

(Testimony of William T. Rawlins.)

gust, 1911. I fix those two dates because on the first of July we moved our office up to the building on Fort Street, and my last date in that office was the 15th of August, when I was taken to the Queen's Hospital, and it was between those two dates when I went over to Mr. Harrison's office and Davis was there, and there was some talk there and Davis seemed to desire to arrive at some understanding and said they thought they could get together on the proposition, and he said there was one thing he didn't like,—the way Gear had treated him in Mokapu.

Q. Was there anything said by Mr. Davis as to ownership at that time?

(Objected to as immaterial.)

(No ruling.) [135]

A. Yes. He reiterated the statement that the lease had been made; that he had his interest and Gear had his interest; and he went on to say that he had been advised by his attorney, Mr. Peters, that he could win out in the long run; that he was very sorry Mr. Harrison put his money in that, but he could win.

Q. Was there anything in the third or fourth conversation?

A. Yes. The third conversation took place in Kaneohe. It was the time when my father was in Kau and he was detained on the long ———. I can fix the date if I saw the record of the Court. We went over there, and after the case was disposed of Mr. Davis and Fred Harrison and myself sat down

(Testimony of William T. Rawlins.)

and we talked this matter over and again Davis mentioned the fact of this lease and he seemed to be in a better mood. He said, "Now, Fred, I think we can fix this thing up, but my attorney, I owe him some money and I can't get out of it until I pay him that money."

Q. Was there anything bearing on it as to the chances of ownership?

A. As I stated, the question was all gone over again as to his interest under that lease, and I told Davis at the time, "I'm not interested in that matter any more. I am over here on something else," but we talked it all over there— And by that time your firm had got into the matter, but we talked this all over and I told him I had seen a copy of this instrument that Gear had given him a half interest in it, and he seemed to be willing to call it all off and take a part interest in it, but the whole thing seemed to be that he owed Peters some money and he didn't think he would be able to settle it. [136]

Cross-examination.

(By EMIL C. PETERS, Esq.)

Q. When did this conversation occur?

A. Some time prior to the first of July.

Q. July, 1911?

A. July, 1911. I had my office in this building at that time. We went over to Kulau with two machines with the Japanese.

Q. At that time wasn't the argument advanced by Mr. Davis or counsel representing him that this

(Testimony of William T. Rawlins.)

lease from Holt to Gear was simply a subterfuge?

A. No. I'll tell you the rest of this conversation. We had a drink of gin and we got to talking and we talked about this trust deed, and Wallie told me about the transactions he had with John K. Sumner. He deeded him a half of his interest and Wallie had to pay money back at a certain time. And we talked it all over and he wanted my opinion in regard to this trust deed, and I told him, "You had better consult your lawyer."

Q. Mr. Davis at that time advised you that previously he had conveyed one-half of the premises to John K. Sumner and that he could repurchase that on the payment of a sum of money?

A. He told me his attorney said it was like a mortgage; that a certain amount of money had to be paid back within a certain time.

Q. And he also told you in addition to this conveyance that there was actually a note and mortgage existing on Mokapu, all of which was anterior to this lease, did he not?

A. Subsequent to the whole Gear lease. The Gear lease was [137] in 1910 and the whole of this was after.

Q. No. You don't understand me. The other instrument, which was actually a mortgage which had been made by him, Davis, to John K. Sumner, was prior to this Holt-Gear lease?

A. That was the first I knew of it; and he also informed me at that time—and from the statement he made I subsequently won a case when they tried



(Testimony of William T. Rawlins.)

to foreclose that mortgage—he told me, Wallie Davis told me you had advised him and they would get Harrison, as he put it, “by the balls”; that’s the language he used.

Q. Who used that language?     A. Wallie.

Q. In any event, upon this first conversation, Mr. Rawlins, Davis intimated to you that he believed that under this trust deed he was the person who could sell and dispose of Mokapu, did he not?

A. No; I wouldn’t say he intimated that, because in talking to him one of the things that was asked of me by Wallie was if I thought this mortgage was on the land or of his interest in it, and I said, “I’m not your attorney. Go to you attorney.” But he seemed to think that was the big question in it.

Q. That was the big question in it, as to whether he had conveyed the land or a sort of expectancy?

A. The rent and income of the property, as I understood it.

(Adjourned *sine die*.)     [138]

At the hour of two o’clock P. M., on Monday, November 17, 1913, all parties to the action being present in court, the following further proceedings were had:

Mr. Lymer presented a motion to allow further evidence to be introduced.

(Objected to.)

(Motion granted.)

Mr. Peters noted an exception, and moves the Court to reconsider the motion and deny the same on the ground that no specific evidence is offered.



(Testimony of William T. Rawlins.)

The Court vacated and set aside its order herein, and ordered that the motion to reopen be granted, and counsel be permitted to put in evidence in that certain case Equity No. 1828, and supplement the same by the testimony of the plaintiff, showing or tending to show that the condition existing at the time of filing the answer existed at the time of bringing this case.

(Adjourned to Wednesday, November 19, 1913, at the hour of two o'clock P. M.)

At the hour of two o'clock P. M. on Wednesday, November 19, 1913, all parties to the action being present in court, the following further proceedings were had and testimony taken:

Mr. LYMER.—At this time I desire to offer in evidence the files in Case No. 1828, Equity Division of the Circuit Court of the First Judicial Circuit of this Territory.

(Objected to as incompetent, irrelevant, and [139] immaterial, not tending to prove or disprove any of the issues in the case.)

(Objection overruled. Exception.)

Files offered in evidence received in evidence as plaintiff's exhibit.)

**[Testimony of Frederick Harrison, in His Own Behalf (Recalled).]**

FREDERICK HARRISON, the plaintiff, recalled as a witness in his own behalf, testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. There has been heretofore offered in evidence

(Testimony of Frederick Harrison.)

in this suit the files in No. 1814, Equity Division of this court, a suit to foreclose a mortgage brought by Fred Harrison, plaintiff, against A. V. Gear and Addie B. Gear, his wife, defendants. Were you the plaintiff in that action to foreclose mortgage?

A. I am.

Q. And the files show here that—I want to ask you first, was there anything you were seeking to foreclose in that mortgage foreclosure suit that has anything to do with the present suit?

(Objected to, as the files in evidence are the best evidence.)

(Argument. Question withdrawn.)

Q. I will ask you this. In this foreclosure proceeding when the time came for a sale to be made, a commissioner's sale under order of the Court, who bought in whatever interests were foreclosed in this proceeding?

(Objected to as incompetent, irrelevant, and immaterial.) [140]

(Argument. Objection overruled. Exception.)

A. Cecil Brown.

Q. Whose money was used in this purchase, Mr. Brown's money or someone else's?

(Objected to as immaterial.)

(No ruling.)

A. It was my money. I went right down to the bank and made a check out and paid it over to Cecil Brown.

Q. So that Cecil Brown took it over as trustee for you?

(Testimony of Frederick Harrison.)

(Objected to as incompetent, irrelevant, and immaterial.)

(Question withdrawn.)

Q. And Mr. Brown became purchaser for you with your money of whatever was foreclosed?

A. That is right.

Q. After these foreclosure proceedings, when Mr. Brown took title, as you testified, was anything done by you or Mr. Brown to determine your rights in Mokapu?

A. Yes. I instructed Mr. Brown to bring a suit of partition, which I think was brought before Judge Whitney, and I think Judge Whitney decided against us in that case, and I think we appealed from his decision to the Supreme Court.

Q. I hand you File 1828, Equity Division, partition suit, and will ask you if that is the suit brought by Mr. Brown by your procuration? A. Yes, sir.

Q. Who paid the costs? A. I did.

Q. Who retained the attorneys?

A. I did. [141]

Q. Did Mr. Brown have anything to do with it?

A. No; I engaged Mr. Thompson, your firm.

Q. You struck a snag in this suit, I understood you to say. What happened when this suit was on trial before Judge Whitney?

(Objected to as immaterial and the record is the best evidence.)

(Question withdrawn.)

Q. Has that suit ever been terminated?

(Testimony of Frederick Harrison.)

(Objected to, as record is the best evidence.)

(Question withdrawn.)

Q. This record, Mr. Harrison, shows that on August 14, 1912, his Honor, Judge Whitney, filed a decision holding that the question of title involved in these partition proceedings and the parties would have to go to law to quiet that title before they could conclude the partition suit; that the partition suit would have to be withheld and not proceeded with further until the case was determined. What, if anything, did you do after the opinion of the Supreme Court upholding Judge Whitney's ruling came down?

(Objected to as immaterial.)

(Argument. Objection overruled. Exception.)

A. In regard to the partition suit?

Q. Yes. When this opinion of the Supreme Court came down upholding Judge Whitney and stating that the parties had to go to law to quiet title before they could conclude the partition suit? What did you do?

A. I instructed my lawyers to go ahead and enter a new suit to quiet title.

Q. In whose name? [142]

A. In the name of Cecil Brown, trustee.

Q. And the records show—

A. I think he brought that case and my attorneys took a nonsuit.

Q. I show you Law No. 7695 of the files of this Circuit Court, Cecil Brown, Trustee, v. Robert



(Testimony of Frederick Harrison.)

Wyllie Davis, and will ask you if that is the suit brought at your instigation to quiet title?

(Objected to as immaterial.)

(Objection overruled. Exception.)

A. Yes, sir.

Mr. LYMER.—May I put this in evidence, your Honor? I offer it in evidence. (Referring to Law No. 7695.)

(Objected to as immaterial.)

(Objection overruled. Exception.)

(Law No. 7695 received in evidence as plaintiff's exhibit.)

Q. In this case, Mr. Harrison, the record shows that on the 27th day of June, 1913, judgment was given for the defendant upon the ground that the plaintiff had asked for a nonsuit in the case. When that nonsuit was granted what, if anything, further did you do?

(Objected to as immaterial.)

(Objection overruled. Exception.)

A. I went to my lawyers and they advised me to write to Cecil Brown to assign over all his interests he had, and also to get a quitclaim deed from Addie B. Gear, and after that I entered suit in my own name to quiet title.

Q. And that is the present suit?

A. That is the present suit that is now pending, and I have also been firing at this thing ever since, paying all the costs [143] and such things.

Q. What pertinent and germane remarks have



(Testimony of Frederick Harrison.)

you to make about this partition suit and the two suits to quiet title? Have you anything to say about it?

(Objected to as immaterial.)

(Objection sustained.)

Q. I want to limit this question. I am going to ask you about a time subsequent to the filing of this present suit, I think that is in June, 1913. At or about the time when this present suit was instituted, Mr. Harrison, were you present on any occasion when any statement was made either by Mr. Davis or his attorney, Mr. Peters, as to any claim that Wyllie Davis was urging in this land of Mokapu, directing your attention to the time about when this last suit was filed?

A. At one time, I don't know exactly what time it was, I happened to be in Mr. Rawlins' office—

(Objected to as indefinite.)

Q. Place it just as nearly as you can, approximately.

A. I should judge it is from three to four months ago.

Q. Was it before or after the filing of this present suit? A. In June?

Q. Yes.

A. It was before.

Q. How long before?

A. I should judge about somewhere around about that time; just close to it.

Q. Can you state to the Court whether or not it

(Testimony of Frederick Harrison.)

could have been more than two weeks prior to the time when this last suit was filed?

A. I couldn't state the time. I know the conversation took place and I was in the office and Mr. Rawlins was there [144] at the time.

Q. What is your best recollection of the time?

A. I should judge it was between four and five months ago.

Q. Five months would be last June. In this conversation which you say took place in your presence about five months ago who was present?

A. Mr. Rawlins, myself—

Q. Who else?

A. I don't know. Several Koreans I think in the office at the time. I don't remember.

Q. Were the only persons present yourself and Mr. Rawlins and some Koreans? A. Yes.

Q. Who made the statement? A. Mr. Peters.

Q. He was present? A. Yes.

Q. What was said in regard to Mokapu at that time, if anything, and with regard to Mr. Davis' claim?

A. I think Mr. Peters came in and asked for some pleadings in regard to the foreclosure suit of Mr. Rawlins. Mr. Rawlins looked for these pleadings, I believe, and couldn't find them, and Mr. Peters said he could get them up in the Circuit Court, and so we were talking over Mokapu affairs and Mr. Peters said to me, "Why don't you buy Mokapu?" And I said, "What do you want for it?" He said, "I think

(Testimony of Frederick Harrison.)

"I can get it for *you thirteen* or fourteen thousand dollars." And I asked him if he thought he could get me a free title, and he said, "I think I can," and Mr. Rawlins said, "What are you going to do with these other titles?" And Mr. Peters said, "I think I could go [145] to court and get a naked trust." And I told him if he could get a clear title to Mokapu for that amount of twelve or thirteen thousand dollars I would take it over.

Q. What was said by Mr. Peters?

A. He told me he could go to court and get a naked trust and get a clear title to Mokapu.

Q. For whom? A. For us; for me.

Q. Was anything said about Wallie Davis at this time?

(Objected to as leading and suggestive.)

(Objection sustained.)

Q. He said he could go to court and get a naked trust?

A. I didn't know what a naked trust was.

Q. And that would constitute a clear title which he could sell to you for thirteen thousand dollars?

(Objected to as leading and suggestive.)

(Objection sustained.)

Mr. PETERS.—I move to strike it all out, as it seems to be in the way of a compromise, in the way of conflicting interests. I mean a compromise of that character is privileged. I mean the whole conversation. I move to strike out all this so-called offer of a compromise of conflicting interests as tes-

(Testimony of Frederick Harrison.)

tified to by Mr. Harrison on the ground that it was in the nature of a compromise and privileged.

Mr. LYMER.—I don't mind this going out, but I do want left in the record the statement made by Mr. Davis' representative, Mr. Peters, that he could go into court and get a naked trust declared. I want to tie this up to show that at just about the time this last suit was brought the attorney for Mr. Davis appeared and said, "I can go to court and get a [146] naked trust declared and sell for thirteen thousand dollars."

The COURT.—I certainly think there is no question that all that pertains to a compromise should go out. The entire conversation concerning the settling of the controversy will be stricken.

Mr. LYMER.—This entire answer touching the conversation held between Mr. Peters and Mr. Rawlins and the witness goes out?

The COURT.—On the ground that it was a conversation pertaining to a compromise.

(Exception.)

Cross-examination.

(By EMIL C. PETERS, Esq.)

Q. This so-called conversation—

(Objected to as not proper cross-examination.)

(Argument. Objection sustained.)

Mr. LYMER.—That is all, your Honor. It is not necessary for me to rest again, as I have already rested except for this limited hearing.

The COURT.—Counsel will be notified when the



decision on the motion for nonsuit is ready.

(Adjourned *sine die*.) [147]

I CERTIFY that the foregoing is a true and correct transcript of my stenographic notes taken on the trial of the above-entitled cause.

HERBERT R. JORDAN,  
Official Reporter.

Honolulu, T. H., January 2, 1914.

[Endorsed]: Circuit Court, First Circuit, Territory of Hawaii. Fred Harrison vs. Robt. Wyllie Davis. Transcript of Evidence. Circuit Court, Jan. 13, 1914. First Jud. Circuit. Filed Jan. 13, 1914. A. K. Aona, Clerk.

No. 757. Received and filed in the Supreme Court, January 14, 1914, at 8:40 A. M. J. A. Thompson, Clerk.

No. 814. Received and filed in the Supreme Court November 28, 1914, at 9.45 A. M. Robert Parker, Jr., Assistant Clerk. [148]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

ACTION TO QUIET TITLE.

Law No. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.



**Transcript.**

**APPEARANCES:**

For Plaintiff: Messrs. THOMPSON, WILDER,  
MILVERTON & LYMER.

For Defendant: EMIL C. PETERS, Esq.

HERBERT R. JORDAN,

Official Reporter. [149]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

**ACTION TO QUIET TITLE.**

LAW No. 7783.

FRED HARRISON,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Transcript.**

The above-entitled cause having been remitted to this court by the Supreme Court for further trial by remittitur dated March 7, 1914, came duly on for hearing at the hour of three o'clock P. M., on Monday, April 13, 1914, before the Honorable William

L. Whitney, Second Judge of the above-entitled Circuit Court, William B. Lymer, Esq., of the firm of Messrs. Thompson, Wilder, Milverton & Lymer, appearing for the plaintiff herein, and Emil C. Peters, Esq., appearing for the defendant, and the following proceedings were had and testimony taken:

**[Testimony of George K. Kopa, for Defendant.]**

GEORGE K. KOPA, resumed the stand as a witness for the defendant, and testified as follows:

Direct Examination.

(By EMIL C. PETERS, Esq.)

Q. Will you produce, Mr. Kopa, please, Liber 302, and turn [151] to page 192 and see what you have.

A. (Witness refers to book and page mentioned.) I find a deed made by Robert Wyllie Davis and wife to John K. Sumner.

Q. Read it, please.

(Objected to as incompetent, irrelevant, and immaterial; defendant estopped from introducing any such deed in evidence.)

(Argument.)

(Ruling reserved and answer allowed in subject to being stricken upon announcement of Court's ruling on objection.)

A. (Witness reads from Book 302, page 192 *et seq.*)

“KNOW ALL MEN BY THESE PRESENTS: That I, Robert W. Davis, of Honolulu, County of Oahu, Territory of Hawaii, for and in consideration of Two Thousand, Seven Hundred and Ninety-four

(Testimony of George K. Kopa.)

and 93/100 (\$2,794.93) to me paid by John K. Sumner of said Honolulu, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said John K. Sumner all my one-half ( $\frac{1}{2}$ ) undivided share and interest in and to that certain piece or parcel of land situated at Koolaupoko, Island of Oahu, aforesaid, known as the land of Mokapu and [152] more particularly described as follows”:

Mr. PETERS.—You may omit the description if it will be admitted that it is the same as in the trust deed.

Mr. LYMER.—I consent to that.

A. (Witness resumes reading:) “To Have and To Hold the same with all rights, privileges, and appurtenances thereto belonging or appertaining to the said John K. Sumner and his heirs and assigns forever and to their own use and behoof forever.

“And I hereby for myself and my heirs, executors, and administrators covenant with the grantee and his heirs and assigns that I am lawfully seized in fee simple of the premises; that I have good right to sell and convey the same, as aforesaid; that the same are free and clear of all encumbrances; and that I will and my heirs, executors, and administrators shall warrant and defend the same to the grantee and his heirs and assigns against the lawful claims and demands of all persons whatsoever.

“And I, Mary Kealohanui Davis, wife of the said Robert W. Davis, for the consideration aforesaid,

(Testimony of George K. Kopa.)

release to the grantee and his heirs and assigns all right of and to dower in the granted premises.

“In Witness Whereof we, the said Robert W. Davis and the said Mary Kealohanui Davis, his wife, hereto set our hands and seals this first day of January, 1906.

“(Signed) ROBERT W. DAVIS.

“(Signed) MARY KEALOHANUI DAVIS.”

Acknowledged before Alfred T. Brock, Notary Public, First Judicial Circuit, on the 6th day of February, 1906, and recorded March 4, 1908, at 12:52 o'clock P. M. [153]

Q. Turn to Liber 303, page 91, and tell us what you have there.

(Objected to as incompetent, irrelevant, and immaterial; defendant estopped from introducing document in evidence—Ruling reserved and answer allowed in subject to being stricken when Court announces ruling on objection.)

A. (Witness reads from Book 303, pp. 91 *et seq.*)  
“Know All Men by These Presents: That I, Robert W. Davis of Honolulu, County of Oahu, Territory of Hawaii, for and in consideration of Two Thousand, Five Hundred (2,500) Dollars, to me paid by John K. Sumner of said Honolulu, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to the said John K. Sumner all my undivided one-half share and interest in and to that certain piece or parcel of land situated at Kooaupoku, Island of Oahu, aforesaid, known as the land of Mokapu and more particularly described as follows:



(Testimony of George K. Kopa.)

(Description omitted by agreement of counsel that it is the same as contained in the Sumner trust deed.)

“To Have and To Hold the same with all rights, privileges, and appurtenances thereto belonging or appertaining to the said John K. Sumner and his heirs and assigns to their own use and behoof forever.

“And I hereby for myself and my heirs, executors, and administrators covenant with the grantee and his heirs and assigns that I am lawfully seized in fee simple of the granted premises; that I have good right to sell and convey the same, as aforesaid; that the same are free and clear of all [154] encumbrances; and that I will and my heirs, executors, and administrators shall warrant and defend the same against the lawful claims and demands of all persons whatsoever.

“And I, Mary Kealohanui Davis, wife of the said Robert W. Davis, for the consideration aforesaid, hereby release to the grantee and his heirs and assigns all right of and to dower in the granted premises.

“Provided, nevertheless, that if I or my heirs, executors, administrators, or assigns shall pay unto the said John K. Sumner or his heirs or assigns the sum of \$2,500 in five years from this date, with interest semi-annually, at the rate of seven per cent per annum, and shall not commit or suffer any waste of the granted premises or any breach of any covenant herein, then this deed and note signed by me whereby I promise to pay to the said John K. Sumner the said



(Testimony of George K. Kopa.)

sum and the interest aforesaid shall be void.

“But upon any default in the observance or performance of the foregoing covenants the grantee, his heirs, executors, administrators or assigns may sell the granted premises, or such portions thereof as remain subject to this mortgage and may sell and convey the same with all rights and privileges thereto belonging at public auction in said Honolulu in accordance with the provisions of Chapter 139 of the Revised Laws of Hawaii and amendments thereto, entitled, ‘Foreclosure of Mortgage,’ without making any demand or any entry, and may convey the premises so sold by proper deed to the purchaser or purchasers thereof absolutely in fee simple in his own name or as my attorney in fact hereby irrevocably constituted, and such sale shall forever bar me and all persons claiming under me from all interest, whether at law or in equity, in [155] the granted premises. And out of the moneys arising from such sale or sales the grantee or his representatives shall be entitled to retain all sums secured by this deed, whether then or thereafter payable, including all costs, charges, expenses and reasonable attorney’s fee incurred or sustained by them by reason of any default in the performance or observance of said condition running, if any, to me or my heirs and assigns.

“And I hereby for myself and my heirs and assigns covenant with the grantee and his heirs, executors, administrators, and assigns that in case a sale shall be made under the foregoing power, I or they will upon request execute, acknowledge, and deliver to the

(Testimony of George K. Kopa.)

purchaser or purchasers thereof a deed or deeds of release confirming such sale.

“And it is agreed that the grantee and his heirs and assigns or any person or persons in his or their behalf may purchase at any sale made as aforesaid. And that no other purchaser shall be answerable for the application of the purchase money.

“In Witness Whereof we, the said Robert W. Davis and Mary Kealohanui Davis, herunto set our hands and seals this second day of January, 1906.

“(Signed) ROBERT W. DAVIS.

“(Signed) MARY KEALOHANUI DAVIS.”

Acknowledged before Alfred T. Brock, Notary Public, First Judicial Circuit, the 6th day of January, 1906. Recorded on the 4th day of March, 1908, at 12:35 o'clock P. M. [156]

**[Testimony of Robert Wyllie Davis, for Defendant.]**

ROBERT WYLLIE DAVIS, the defendant, was duly sworn as a witness in his own behalf, and testified as follows:

Direct Examination.

(By E. C. PETERS, Esq.)

Q. You are named the mortgagor in a certain mortgage from yourself and wife to John K. Sumner, dated the 2d of January, 1906, recorded in Liber 303 at page 91. I will ask you whether or not you have ever paid up the amount secured by that mortgage?

Mr. LYMER.—I object to giving any evidence about a conveyance from Robert Wyllie Davis to John K. Sumner or to anybody else as incompetent, irrelevant, and material, and the defendant is es-

(Testimony of Robert Wyllie Davis.)

topped from introducing any such papers in evidence.

(By consent of counsel the objections heretofore interposed to the introduction of documents applies to all questions concerning them.)

(Ruling on objection reserved.)

A. No; never been paid.

Q. Do you recollect the time you made the assignment. Mrs. Davis' joining therein by way of release of dower to Sumner dated the first of January, 1906, and recorded in Liber 302, Page 92? A. Yes.

Q. After that deed and mortgage was made what, if anything, did Mr. Sumner do with respect to Mokapu?

A. He went there and lived. Moved over there and took charge of the place.

Q. What use, if any, did he make of the premises?

A. He used it for agricultural purposes, such as planting, and [157] he bought some hogs.

Q. You went into partnership with him in the hog business?

A. Yes.—And also some cows; bought some cows and turned them into the pasture.

Q. State how long Mr. Sumner has been in possession over there?

A. He was over these for over a year. Stayed over there for a year and then he left me in charge and moved back to town.

Q. State whether or not after that he visited the premises. A. Oh, yes.

(Testimony of Robert Wyllie Davis.)

Q. When was the last time he has been on the premises?

A. He made trips over there occasionally all the time. He had a little buggy and horse. Sometimes he would come with Al Brock and sometimes with Mr. Mott-Smith.

Q. Mr. Brock and Mr. Mott-Smith were representing him under trustees and powers of attorneys as agents? A. Yes.

Q. How long did that continue?

A. That continued, as far as I can recollect, up to the time—It was a little after the time Mott-Smith was appointed secretary, and Brock went to the coast; and it was way after that, it was later on after that and just before Ulysses Jones took charge of his business.

Q. When was that?

A. When Jones took charge?

Q. Yes.

A. As near as I can recollect—I couldn't give you the exact date. It was just about when A. V. Gere came in; that was before Jones, and it was during that time when A. V. Gere had it. He made one trip and he didn't come over after that until Jones got it. That's as near as I can give you the time. [158]

Q. Have you ever seen the deed of assignment from John K. Sumner to Jones?

A. The deed of assignment?

Q. The deed of assignment from John K. Sumner to Jones, or a copy of it. The reason that I ask is that the date is the 15th of July, 1911, and I ask you



(Testimony of Robert Wyllie Davis.)

if from that you can fix the time as to when Jones became the agent of Mr. Sumner?

A. No, I don't remember seeing that.

Mr. LYMER.—I will admit that is the date of the deed.

Q. After Jones took possession of it or became Mr. Sumner's agent state whether or not Mr. Sumner ever visited over there?

A. Yes; he took the trip over there with Jones and his wife, and Mr. Sumner himself came over—

Q. And lately has he been over there?

A. He has been over there now with me something like four months. He just came up together with me today.

Q. During that time, Mr. Davis, you also have been in possession over there?

A. I have always lived there. It is my home.

Q. And have been using the premises for any use at all? A. Ever since that time.

Q. What use have you made of the premises?

A. I used it for planting melons and cotton. It was through this melon planting when A. V. Gere came in he brought down a little bag of Caravonica cotton seed and told me to experiment with it, and—

Q. Never mind about that. A. (No answer.)

Mr. PETERS.—That's all. [159]

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Cross-examination.

(By WILLIAM B. LYMER, Esq.)

Q. You never have paid that mortgage?



(Testimony of Robert Wyllie Davis.)

A. No.

Q. Still owe it in full?      A. Yes.

Q. That mortgage was given on January 2, 1906, and the deed referred to by Mr. Peters, your counsel, was January 1, 1906? As a matter of fact, wasn't this deed given January 1, 1906, and signed by you and your wife and John K. Sumner really a mortgage, just a deed given to secure moneys advanced to you by Mr. Sumner? Is not that a fact? It wasn't simply a deed, but a mortgage?

(Objected to as incompetent, irrelevant and immaterial.)

(Argument. Question withdrawn.)

Q. This mortgage of *your* was given the first part of January, 1906,—you remember that?

A. It may have been. I haven't seen it for a long time.

Q. And about the time it was given Mr. Sumner went over and went into possession of Makapu?

A. About that time. The first or second. There was two; there was a mortgage and the deed.

Q. But they were given within twenty-four hours of each other. About how long after they were given did Sumner go over and take possession?

A. Sumner went there—he was there right along, or at Moku Manu, this little island in the Bay of Heeia and he used to come across in the boat to Makapu.

Q. How long before this deed was given did Mr. Sumner come over, three or four or five years prior to that time?

A. To my knowledge Sumner always called there

(Testimony of Robert Wyllie Davis.)

even before we [160] made the deed; even when it was leased to the Kaneohe Ranch it was a habit of his to go and look at Mokapu and he was going there off and on.

Q. And after you gave this mortgage to him in January, 1906, he just kept right on coming as he had before?

A. No; after these papers were drawn up then he stayed there a good deal of the time.

Q. About how much of the time?

A. Well, Mr. Sumner is a great church member and he would come sometimes of a Monday morning and stay until Saturday afternoon and come to town and stay one or two days and come over there, and he began to hire laborers. He hired some Japanese and some native women over there and started them planting potatoes and vegetables and all kinds of stuff.

Q. And how long was it he stayed over there and took charge of things?

A. Over a year,—that is, staid right there and came to town and he took sick and he was very sick and then he was under the doctor's care, Macdonald; he advised him not to go over there.

Q. After about a year or something over a year down there he came to town here and was sick and was under Dr. Macdonald's care, and the doctor told him not to go there so much?

A. For a while, yes.

Q. Did he go over and live again?      A. Oh, yes.

Q. How long did he stay the second time?

(Testimony of Robert Wyllie Davis.)

A. The same as usual,—stay over a week and come over here for a day or two days and come back.

Q. Was he living there or where at the time A. V. Gere took that deed from A. V. Holt, Trustee? I am talking about the beginning of Gere's time. Was Sumner living on that land of [161] Mokapu down there at the time Gere took his 25-year lease?

A. He was down and back to town. He wouldn't be there all the time. I remember his coming to Mokapu and telling me he had a new trustee.

Q. You were living at Mokapu all these years?

A. Oh, yes.

Q. Do you know when the Gere lease for 25 years was given to Gere? A. Lease to Gere?

Q. Do you remember the lease to Gere? Do you recall the lease? A. I don't know.

Q. You don't know whether or not A. V. Gere took the lease to Makapu?

A. He spoke to me about getting a lease made.

Q. But you didn't know he got one made?

A. As near as I can remember, I think he showed me a lease.

Q. As near as you can remember, didn't you sign it by way of consent? Don't you remember, as a matter of fact, signing this lease in June, 1910?

A. Well, Gere had so many documents presented to me that I got all mixed up. It was one time for planting and for hog ranching and for partnership and at one time he deeded a piece of property that belonged to Sumner,—and he had so many documents that I don't know.

(Testimony of Robert Wyllie Davis.)

Q. When did Gere first go down there to Mokapu?

A. It may have been three or four years ago. I'm not quite positive.

Q. Did he go down there and live and make Mokapu his home?

A. As I stated, he brought me some seed—

(Question objected to as improper cross-examination.)

(No ruling.) [162]

Q. I am trying to find out whether Mr. Sumner was living there at that time. Did Gere live down there, or did he just come down there? Did he just come down once in a while or make his home there?

A. Later on he started in to gin cotton and then he moved over to a little cotton house where the cotton was.

Q. When he first came in was Sumner living there?

A. No; Sumner used to come and visit us and go back.

Q. Wasn't Mr. Gere living on Mokapu in the house with you when he first came down there? Didn't he go in *an* live and occupy a house along with you?

A. He didn't occupy any house at all. I gave him a bed to sleep in.

Q. And part of the time he wasn't there at all?

A. Yes; part of the time he wasn't there at all.

Q. About how often was Sumner making visits to Mokapu at the time Gere came into that Mokapu business down there?

A. When I saw my uncle that he was giving up coming down to Mokapu it was the time he brought



(Testimony of Robert Wyllie Davis.)

suit. He got sore because Gere spent all his money and that was the time he employed Watson and Thayer in that case and that was the time I found out he wouldn't come down there and wouldn't speak to Gere and wouldn't have anything to do with him.

(Adjourned to 9:00 o'clock A. M., Thursday, April 16, 1914.) [163]

On Thursday, April 16, 1914, at the hour of 9:20 o'clock A. M., all parties to the action being present in court, the following further proceedings were had and testimony taken:

ROBERT WYLLIE DAVIS resumed the stand as a witness in his own behalf, and testified as follows:

Cross-examination (Continued).

(By WILLIAM B. LYMER, Esq.)

Q. I understood you yesterday to say that about the time this so-called deed was given—

Mr. LYMER.—The Supreme Court sent back the order that your Honor overrule the motion for nonsuit. I suppose that is acquiesced in by everybody.

The COURT.—Obeying the mandate of the Supreme Court, the Court will deny motion for nonsuit heretofore made.

Mr. PETERS.—To which ruling of the Court the defendant here and now excepts.

The COURT.—The exception will be noted.

Q. Now, Mr. Davis, I understood you yesterday in your testimony that you said about the time these two instruments were given by you to Sumner, one of them a mortgage on its face and the other a deed,



(Testimony of Robert Wyllie Davis.)

(that was in January, 1906)—that about that time Sumner went into the possession of Mokapu and used it as his residence and stayed there for over a year,—that is true?

A. I don't remember saying that yesterday. You mean the day before?

Q. I mean is it or is it not true you stated that Sumner took up his residence in Mokapu and stayed there for over a year immediately after the giving of these two instruments? [164]

A. As I stated, he went to Moku Mano, a little island close to Mokapu, before he got this mortgage and deed.

Q. How about after?

A. He used to come over and visit me and stay over there sometimes, and after that, when he had the mortgage and deed, he came over there.

Q. And lived there? A. And lived there.

Q. And he lived there for more than a year?

A. Quite a length of time. It may have been a year or over a year.

Q. It wasn't two years, was it, before he went away?

A. I couldn't say as to that, whether two years or three years.

Q. My note of what you said yesterday is to the effect that after the deed and mortgage were given Sumner then went on to Mokapu and made his home there and stayed there for more than a year, and then he came to Honolulu and the doctor, Dr. MacDonald, told him he was sick and then he stayed

(Testimony of Robert Wyllie Davis.)

away, except for visiting there occasionally, and then stayed away until Jones took hold. How long did Sumner make his home at Mokapu after this so-called deed and mortgage were given?

A. I stated this. He always visited Mokapu even when it was under lease to the Kaneohe Ranch Company, and even when he didn't have the mortgage and deed he used to come there, but after he had the mortgage he went over and carried on a kind of business.

Q. He lived there and slept on the premises and made his home there?     A. Yes, sir.

Q. For how long? [165]

A. It may have been a year or a little over a year. I know when he wasn't feeling well he came up here and was confined to his bed and Doctor Macdonald was attending to him, and he was in bed quite a length of time.

Q. After that he made his home at Kalihi, except he made visits to Mokapu?

A. Kalihi has always been his home when he is in town. Of course, when he goes to the country he makes his home at Mokapu. He has that Mokapu as a sort of resort and goes down to look at a few pigs and that way.

Q. When he came to town and was sick and the doctor advised him not to spend a great deal of time at Mokapu, from that time up to the time Mr. Gere took his lease it is true that he just made visits at Mokapu, rather than making his home at Mokapu?

(Testimony of Robert Wyllie Davis.)

(Objected to, as there is no evidence of advice by Dr. Macdonald. Objection overruled.)

A. (No answer.)

Q. After this sickness of Mr. Sumner, from that time up to the time Gere took his lease is it not true his home was up here at Kalihi where he stayed more than half the time, and that his visits were rather infrequent to Mokapu? Don't begin all over again, but just answer the question.

A. The doctor mentioned that to him because he used to drive over himself all alone sometimes and the doctor didn't think fit he should be going over on such a long drive alone, and he would rather he stayed in town until he got quite well, until he made those trips over to Mokapu.

Q. After he became a little better and began visiting Mokapu again, from that time up to the time when Gere took his lease his visits to Mokapu were just occasional visits and his [166] home was in Kalihi?

A. His home was in Kalihi, yes,—when he was in town.

Q. And you were down in charge for him all that time? A. Well, in charge for myself, too.

Q. What do you mean by that, "In charge for myself, too?"

A. I got an interest in the place. I was planting. I was raising a few stock over there for agricultural purposes. I was doing so all the time up to the time Gere got in. As I stated, when I was planting melons Gere came along with a bunch of Caravonica

(Testimony of Robert Wyllie Davis.)

cotton seed and wanted me to plant in between the vines.

Q. So you were running it for your own interest, as well as Mr. Sumner's?

A. Well, Mott-Smith and Brock had charge of his business and after that I believe Carlos Long came in and after that Gere got hold of his business.

Q. Now, Mr. Davis, at the time when this so-called deed was given in January, 1906, to Sumner of an undivided half of Mokapu at the same time there was an agreement drawn up whereby it was agreed in writing between you and Mr. Sumner that if you would within five years of that time pay up the sum of \$2,794.93, with interest at 7% thereon from January 1, 1906, at any time within five years, Sumner would reconvey to you. Now, as a matter of fact, you never paid up that debt to Sumner?

(Objected to as immaterial and not proper cross-examination. Argument. Objection sustained.)

Redirect Examination.

(By E. C. PETERS, Esquire.)

Q. You spoke about Gere going over there, was that about [167] the time Gere was acting as Mr. Sumner's agent? A. Yes.

Q. What was Gere doing over there?

A. He came over there and told me—

Q. I am not asking you what he said. I am asking you what he did. Did he stand on his head, did he raise ducks, did he plant chickens, or what did he do?



(Testimony of Robert Wyllie Davis.)

A. When he came over there, as I stated, he brought this seed over and told me to plant it, and I did so.

Q. Did he plant anything over there?

A. He planted later on some cotton farther down below and he went to work and broke down an old shack we had on the place there for some time—without our permission—and built it up over across from our house and moved in there and started to pick the cotton and gin it, and first thing I knew I saw the bales standing there marked, “A. V. GERE,” and it was shipped to Honolulu and then it went to New York—

Q. Now, when Mr. Gere was over there attending to this cotton did he sleep on the premises?

A. He asked if he could have a room in my house, and I said, “Yes.”

Q. During what period of time, how long did he raise cotton and live on the premises?

A. He was over to our house for a few months, and moved over across to the place where they ginned the cotton.

Q. And that was during the time he was agent for Mr. Sumner?

A. That was during the time he was agent for Mr. Sumner.

Mr. PETERS.—I desire to offer in evidence the *complain* in the case of Cecil Brown, Trustee, vs. Robert Wyllie Davis, [168] numbered and docketed in this Court as “Equity No. 1828.”



(Testimony of Robert Wyllie Davis.)

(Objected to as incompetent, irrelevant and immaterial.)

(Argument.)

Mr. LYMER.—We admit that Robert Wyllie Davis took a half of our term of years, 25 term of years.

Mr. PETERS.—On that admission the complaint is admissible in evidence.

The COURT.—If that is the purpose of the admission, it is merely cumulative now.

Mr. PETERS.—It may be considered cumulative, but we submit we are entitled to have it in for all it is worth.

Mr. LYMER.—I say it is absolutely unnecessary, unless counsel points out some other reason.

The COURT.—If the evidence is offered solely for the purpose of showing an admission by Cecil Brown, Trustee, the petitioner in the case of Cecil Brown, Trustee, *vs. Davis*, that Robert Wyllie Davis was the owner of a one-half undivided interest for a term, the Court is of the opinion it is apparently cumulative and should not be admitted.

Mr. PETERS.—We desire it for the further purpose of showing that as far as the bill is concerned the mortgage did not convey the beneficial interest, and that at the best then the plaintiff in this case is entitled to his undivided quarter.

(Argument.)

The COURT.—The fact that it can be argued that the complaint is an admission, whether or not

(Testimony of Robert Wyllie Davis.)

the Court agrees with that argument, seems to me to present the proposition that the complaint ought to be in evidence. It would have [169] been material before the admission of counsel that Davis had taken a half interest. Although the Court may or may not agree with that, it seems to me it ought to go in for what it is worth.

**[Testimony of George K. Kopa, for Defendant  
(Recalled).]**

GEORGE K. KOPA, was recalled as a witness for the defendant, and testified as follows:

Direct Examination.

(By EMIL C. PETERS, Esq.)

Q. Mr. Kopa, have you produced the power of attorney from A. V. Gere and the revocation of that power of attorney contained in Liber 331, Page 90 et seq., dated November 4, 1909? A. I have.

(By agreement of counsel the documents referred to were considered as read into the record by the witness.)

Q. And bearing the notation, "Revoked, see Rev. P. A., Book 336, Page 36"—

Mr. LYMER.—No objection.

(Documents referred to received in evidence and considered as read in evidence.)

Q. And the revocation, Book 336, Page 36, will also be admitted and considered read?

Mr. LYMER.—No objection.

(Received in evidence and considered read by the witness.)

(Defendant rests.) [170]

[**Testimony of George K. Kopa, for Plaintiff  
(Recalled).**]

GEORGE K. KOPA, was recalled as a witness for the plaintiff and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Mr. LYMER.—I take it that I am not waiving my objections heretofore made?

The COURT.—The Court has reserved its ruling.

Mr. LYMER.—I think I shall be safe if counsel stipulates with me that entering into the evidence, both documentary and oral, having to do with any of the documents presented by the defendant and having to do with any claim made by Davis that his entire interest in Mokapu had been vested in John K. Sumner at a time antecedent to the execution of the 25-year leasehold from Holt, Trustee, to Gere is all done expressly saving the right of the plaintiff to press his objection that all such evidence is incompetent, irrelevant, and immaterial, having nothing to do with any of the issues of the case and likewise that all of such evidence is not available to the defendant because the defendant is estopped,—in other words the defendant just prejudices his case.

Mr. PETERS.—I consent to that, that all evidence available, either direct or cross, stays in.

Mr. LYMER.—Oh, no, you don't—

Mr. PETERS.—I insist upon the right to use every bit of evidence which may be available for

(Testimony of George K. Kopa.)

this defendant. I am willing to have you go on and put on evidence, but I think it reasonable to insist that I get the benefit of any evidence adduced by you. You cannot be in the position to withdraw this entire evidence, if the Court decides the question in your favor as to the main issue, as to the deed and mortgage. [171] If you are going to meet my evidence. I am going to insist upon the defendant availing himself of every bit of evidence adduced, whether the Court rules in your favor or not.

Mr. LYMER.—That practically tells me either to move for judgment or let certain important protection around my client go by the board; so at this time I will excuse Mr. Kopa and move for judgment for the plaintiff upon the grounds, first, that the defendant in his case has not adduced sufficient evidence to meet the *prima facie* case established by the plaintiff before plaintiff rested, and on the specific ground that the deed from Robert Wyllie Davis to John K. Sumner, dated January 1, 1906, and recorded in Liber 302, Page 192, as well as the mortgage from the said Robert Wyllie Davis to John K. Sumner, dated January 2, 1906, recorded in Liber 303, Page 91, are neither of them proper evidence in the case, both the deed and mortgage aforesaid, not showing or tending to show defect in the plaintiff's title to an undivided half interest in Mokapu in a term of years and being no defense which may be pressed with success against the granting of a decree for the plaintiff as prayed for, and that the



(Testimony of George K. Kopa.)

deed and mortgage are as evidence not available to this defendant, said defendant being estopped to introduce evidence of this character, to wit, evidence as to title or rights in the land of Mokapu outstanding in him, or any evidence whatsoever of any conveyances which have as their source or which have the Sumner trust deed as the source from which such titles are traced.

The COURT.—Any objection to granting this motion?

Mr. PETERS.—I don't believe the motion is well taken. I [172] should like to submit a brief.

The COURT.—It is ordered to be submitted on briefs.

(Adjourned *sine die.*)

On Monday, April 27, 1914, at the hour of two o'clock P. M., all parties to the action being present in court, the following further proceedings were had and testimony taken:

Mr. LYMER.—At this time I withdraw a motion for judgment made at the last hearing and desire to proceed with further evidence, stating that this action on my part is done while saving my rights to except and object to the introduction of the documents heretofore introduced.



**[Testimony of George K. Kopa, for Plaintiff  
(Recalled in Rebuttal).]**

GEORGE K. KOPA, was recalled as witness in rebuttal for the plaintiff, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. I hand you a book and ask you to state what it is.     A. Book 336.

Q. Of the records on file in the office of the register of conveyances in Honolulu?     A. Yes, sir.

Q. Turn to Page 247 of that liber and state what is there to the Court?

A. I find an agreement made between John K. Sumner and Robert W. Davis.

Q. And the date of that was what?

A. Dated January 1, 1906. [173]

Q. Will you read it to the Court?

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove or disprove any of the issues in the case—Argument.)

(Question withdrawn.)

**[Testimony of A. V. Gere, for Plaintiff (in  
Rebuttal).]**

A. V. GERE, a witness for the plaintiff in rebuttal, was duly sworn, and testified as follows:

Direct Examination.

(By WILLIAM B. LYMER, Esq.)

Q. Where do you live?     A. Honolulu.

Q. Do you know Mr. John K. Sumner, the grantor of the Sumner trust deed?     A. I do.

(Testimony of A. V. Gere.)

Q. Do you know Robert Wylie Davis, the beneficiary of the Sumner trust deed?   A. I do.

Q. And the defendant in this action?   A. I do.

Q. Are you familiar with the land known as Mokapu on this island?   A. I am.

Q. Have you at any time during the past years resided on the land known as Mokapu?

A. I have.

Q. Have you had anything to do with the land of Mokapu in a business was for exploiting that land for agricultural or other purposes?   A. I have.

Q. When did you first take up this Mokapu in a business way?   A. The latter part of 1909.

Q. About what month, do you remember? [174]

A. I think September or October.

Q. Who was living on Mokapu, if you know, at that time?

A. My first trip to Mokapu was with John K. Sumner.

Q. When was that?

A. That was either September or October, 1909, and he said that Mr. Davis was living on the land, but he wasn't there.

(Moved to strike out answer as to Davis as hearsay.)

(Argument—Ruling reserved.)

(Question withdrawn.)

Q. State to us the history of your business dealings down at Mokapu from that time, in October, paying particular attention in your testimony to the

(Testimony of A. V. Gere.)

matter of actual possession of Mokapu during that time?

(Objected to, as there is no question to withdraw, unless it is understood that both question and answer go out.

Mr. LYMER.—Let it be so understood.

A. In the middle, some time in the middle of October, I think it was.

Q. 1909?

A. 1909. I made an agreement with Mr. Wallie Davis who was living on Mokapu at that time.

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove or disprove any of the issues of the case and not the best evidence—Objection overruled—Exception.)

A. (Witness continues.) And as a result of the agreement with Mr. Davis I went over to Mokapu later on and resided there.

Q. What time did you take up your residence on Mokapu?

A. Off and on from October, 1909, until somewhere along [175] in the middle or early part of 1911.

Q. State explicitly the character of your residence there, Mr. Gere, between September or October, 1909, and the first part of 1910.

A. To start in with I went over occasionally looking after things. I took over some seventy-five dollars' worth of cotton seed and other things. I took over various stock of chickens and geese and turkeys

(Testimony of A. V. Gere.)

and various animals, mules and wagons, and went ahead cultivating the land of Mokapu. I lived in Mr. Davis' house; had a room in his house, and I later on spent nearly all of my time in Mokapu, coming to Honolulu only occasionally.

Q. Now, with regard to the period of time between September or October, 1909, and the first of 1910, what can you say as to whether or not Mr. Sumner was living on Mokapu?

A. Mr. Sumner never went to Mokapu during my connection with the place from the latter part of October, 1909, until I left in April, 1911; was never at Mokapu any of that period. Mr. Davis was spending most of his time in Kaneohe. He had started in a taro business and was back and forth—

(Moved to strike out answer as not responsive.)

(Motion denied—Exception.)

A. (Witness continues answer.) I say he had a taro and poi business in Kaneohe and was spending a great part of his time in Kaneohe, going back and forth. He took a boat over there for convenience in going back and forth from Kaneohe to Mokapu.

(Moved to strike out as not responsive and voluntary statement of the witness—Motion granted.)

[176]

Q. You have stated that you made an agreement with Wyllie Davis as a result of which this work of yours and interest in Mokapu followed, of which you have testified. Do you remember when you took from John D. Holt, Trustee, the 25-year leasehold which is in issue in this suit?



(Testimony of A. V. Gere.)

A. Sometime in the middle or early part or latter part of 1910.

Q. I may say, Mr. Gere, that is dated June, 1910. At the time this lease was given, where were you?

A. I was living at Mokapu.

Q. Were you still working under the agreement with Wallie Davis at the time you took this 25-year leasehold?

(Objected to as incompetent, irrelevant, and immaterial.)

(Argument. Objection overruled. Exception.)

A. The agreement was cancelled coextensively with the issuing of the 25-year lease. There were two agreements that I had with Mr. Davis that I was working under, and the consideration of the execution of the lease was the cancelling of the agreements,—the terms of—

(Moved to strike answer, as witness says there were two agreements and contents we do not know.)

(Argument. Motion denied. Exception.)

Q. And these agreements you have spoken of were entered into between yourself and Mr. Davis. Were you, Mr. Gere, ever present at any conversation between Wallie Davis and Sumner when the matter of Davis' deeding over his interest to Sumner was discussed?

(Objected to, as we don't know of any agreements and the time is indefinite. Objection overruled. Exception.) [177]

A. I was.



(Testimony of A. V. Gere.)

Q. State, as nearly as possible, the time when this conversation was?

A. It was somewhere about the middle of 1909, towards the latter part of 1909. It may have been August or September of 1909.

Q. Where was this conversation held?

A. In my office.

Q. Who was present?

A. Mr. Sumner, Mr. Davis, Mr. Davis' wife and myself. Mr. Sumner sent for them to come to my office and desired them to deed over to him their interests in Mokapu—

(Objected to as incompetent, irrelevant, and immaterial, not tending to prove or disprove any of the issues of this case. Argument.)

The COURT.—Of course, the testimony has to be directed to the time the statement was made. I do not know of any rule which limits time after making of the deed to show what was the intention at the time of making the deed. Motion denied.

(Exception.)

Q. You were answering a question of mine and had stated you were in your office at a time when Wallie Davis and his wife and Sumner were all three there. State what was discussed.

(Objected to as incompetent, irrelevant, and immaterial.)

Q. I will change that by saying, state what was discussed by Sumner and Davis in regard to the ownership of Mokapu.

(Objected to as irrelevant, incompetent, and im-

(Testimony of A. V. Gere.)

material, not tending to prove or disprove any of the issues of this case and calling for a conclusion of the witness.) [178]

(Objection overruled. Exception.)

A. Mr. Sumner asked Mr. Davis and his wife to deed to him the land of Mokapu, and Mr. Davis and his wife both objected and his wife got especially put-out and angry over it,—at the idea of asking them to deed the land to him, and they left.

Q. Just answer “Yes” or “No” to this question. Did you ever know from Wallie Davis’ own lips, his own statement, as to the real intent and meaning of this deed of January 1, 1906, of one-half of Mokapu to John K. Sumner, a deed absolute on its face?

(Objected to as incompetent, irrelevant, and immaterial and indefinite.)

(Argument. Objection overruled. Exception.)

A. Yes.

Q. When, as nearly as you can state, without stating what was stated, was it? About when?

A. That I cannot recall.

Q. Approximately when was it, before you went down to Mokapu in September or October, 1909, or was it after?

A. It was during my residence at Mokapu. While I was engaged with Mokapu.

Q. Was it before or after the giving of this 25-year term? A. No, it was before that.

Q. And where was the statement made?

A. I think in his own residence at Mokapu.

Q. Who was present?

(Testimony of A. V. Gere.)

A. I don't remember anybody but Mr. Davis and myself. His wife may have been there, but I don't think so. I think just Mr. Davis and myself. [179]

Q. Will you state what that statement was?

(Objected to as incompetent, irrelevant, and immaterial, not proving or tending to prove any material issue of the case. Objection overruled. Exception.)

A. He stated that he and Mr. Sumner had gone into partnership together for the purpose of raising pigs and cattle, I think, and other purposes. The partnership didn't flourish, and, I think—I don't remember the man's name now—Mr. Brock, that is it—Mr. Brock had finally effected a settlement of the partnership agreement and I believe he had sold all of the stock and pigs and various things, realized on the partnership, and there was quite a loss, and, I think, Mr. Davis had given security to cover the amount of the loss. That is the best recollection I can give as to the conversation I had with him.

Q. Was there anything more definite stated by Davis as to the nature of the security given?

A. I don't recollect the conversation, excepting as the facts come to me now. I know he had executed a mortgage and a deed—I believe a deed and a mortgage both, but I don't know the details, excepting—It is hazy. I knew he went over with me and explained the proposition, because he was telling me about the pigs; how two of the pigs had got away after the sale, and he had found them later in the pasture beyond, and he found them and they had little ones and he got a start again with them.

(Testimony of A. V. Gere.)

Q. Was there anything you can recall as being said by Mr. Davis with regard to the deed?

A. No; nothing that I heard from Mr. Davis would lead me [180] to think he had done anything more than to give Sumner security.

Q. You stated you went into this Mokapu business down there with Wallie Davis some time about October, 1909, and that you made visits very frequently from time to time and then you took up your residence there. About what time did you take up your residence there and occupy this room in Wallie Davis' house? A. Early part, I think, of 1910.

Q. And how long, then, did you live on Mokapu occupying a room in Wallie Davis' house?

A. It must have been a year and a half.

Q. State, if you can, do you know where John K. Sumner was living from October, 1909, until the year 1911? A. I do.

Q. Where? A. Kalihi.

Q. How do you know?

A. I have been at his home. Seen him at his house.

Q. How frequently have you been in his house? How frequently have you called at the Kalihi home of Mr. Sumner during this period?

A. I don't know; perhaps eight or ten times.

Q. You never saw him at Mokapu?

A. Only once when I went over with him in August or September, 1909; I think it must have been.

Q. Let me ask you, Mr. Gere, did Mr. Davis at this interview you have spoken of when he spoke of giving Mokapu as security, did he mention anything about



(Testimony of A. V. Gere.)

the amount of the advances which he had secured?

(Objected to as incompetent, irrelevant, and immaterial. [18I] Objection overruled. Exception.)

A. I don't know whether he did or not. I am under the impression it was several thousand dollars. Where I got that impression from, I don't know; I don't know whether Mr. Davis ever mentioned the amount or not. I am under the impression that he did, but I could not say.

Q. What time did you say you left Mokapu?

A. I think it was about the middle of 1911; it may have been earlier than that.

Q. Do you know of your own knowledge who took possession after you left? A. I do.

Q. Who? A. Mr. Fred Harrison.

Q. There is on record here in evidence, Mr. Gere, a sublease, or, rather, an assignment by you of one-half of your interest in and to this 25-year term to Wallie Davis after you took the assignment. I want to ask you whether or not the matter of that assignment of this one-half interest was ever discussed between yourself and Mr. Davis and Mr. Sumner, prior to the time when the 25-year term was created in 1910?

(Objected to as incompetent, irrelevant, and immaterial. Objection overruled. Exception.)

A. I had a conversation with Mr. Davis. I don't remember any conversation with Mr. Sumner.

Q. Where was this conversation with Mr. Davis?

A. Both at Mokapu and in Honolulu.

Q. When was the first of these conversations?

A. At Mokapu.



(Testimony of A. V. Gere.)

Q. When?

A. Prior to the execution of the lease from J. D. Holt to myself. [182]

Q. What was the substance of that conversation?

(Objected to as incompetent, irrelevant, and immaterial and not proper rebuttal.)

(Argument.)

Mr. LYMER.—I offer to connect it up with Sumner's understanding.

(Objection sustained.)

Cross-examination.

(By WILLIAM B. LYMER, Esq.)

Q. Mr. Gere, you are the same gentleman, are you not, named in a certain power of attorney from John K. Summer to A. V. Gere, offered in evidence in this case? I haven't the date at hand, but the evidence discloses it was recorded in Liber 331 at page 90.

The COURT.—November 4, 1909.

A. If I can see it I can tell you.

Q. Have you been attorney in fact of Mr. Sumner upon more than one occasion? A. I have.

Q. When were you first attorney in fact of Mr. Sumner?

(Objected to as incompetent, irrelevant, and immaterial.)

(Argument.)

(Adjourned to two o'clock P. M., Tuesday, April 28, 1914.)

At the hour of two o'clock P. M., Tuesday, April 28, 1914, all parties to the action being present in

(Testimony of A. V. Gere.)

court, the following further proceedings were had and testimony taken:

Mr. LYMER.—If the Court please, I will ask that the name of Mr. B. C. Ulrichs be entered of record as assisting counsel [183] at this time. At the adjournment yesterday there was a question propounded by counsel to this witness, and, if the Court will permit it, I should like Mr. Ulrichs to speak about two minutes on the proposition of that objection.

The COURT.—Let Mr. Ulrichs' name be entered of record as assisting counsel.

Cross-examination (Continued).

(By WILLIAM B. LYMER, Esq.)

(Argument resumed.)

The COURT.—The matter may be submitted on briefs. Counsel will be given three, three, and two to file briefs and reply briefs.

(Adjourned *sine die*.)

On Tuesday, June 23, 1914, at the hour of 2:10 o'clock P. M., all parties to the action being present in court, the following further proceedings were had and testimony taken:

Mr. LYMER.—Before this case proceeds to final judgment, I should like the privilege of amending the last prayer of the complaint. I think as it stands it is probably legally all right, but, if the Court thinks it proper, I should like to substitute this phraseology: "Wherefore plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term thereof, unless sooner disposed

(Testimony of A. V. Gere.)

of by judicial authority; that the defendant may be required to set up in the traverse any claim he may have in and to the undivided half of said term of years in said land; that defendant be forever barred from any claim to and of interest in said described undivided half of said term of years and that said undivided half of said term of years may be quieted, and [184] that the plaintiff's ownership therein may be confirmed and the plaintiff herein awarded his costs herein."

The COURT.—The plaintiff herein is granted permission to amend his prayer as follows: "Wherefore, plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term thereof, unless sooner disposed of by judicial authority; that the defendant may be required to set up in the traverse any claim he may have in and to the undivided half of said term of years in said land; that defendant be forever barred from any claim to and of interest in said described undivided half of said term of years and that said undivided half of said term of years may be quieted and that the plaintiff's ownership therein may be confirmed and the plaintiff herein awarded his costs herein."

Mr. PETERS.—I enter formal objection to the amendment as coming too late.

The COURT.—The objection will be overruled and exception allowed.

Mr. LYMER.—Is your Honor disposed at this time to rule on the various matters held under consideration by your Honor for some time now as to

(Testimony of A. V. Gere.)

evidence adduced by counsel for the defense?

The COURT.—Those matters had better be called to the attention of the Court again or else I shall have to go through my notes and find out what they are.

Mr. PETERS.—As I recollect, the only three matters to rule on were the objection to the admission of the mortgage in evidence, the objection to the admission of the deed in evidence, and the objection on the cross-examination of the last witness. There is where we stopped. [185]

The COURT.—The objection to the introduction of the deed of Robert Wyllie Davis and wife to Sumner, recorded in Liber 302, page 192, and the objection to the introduction of the mortgage of Robert Wyllie Davis and wife to Sumner, recorded in Liber 303, page 91, are sustained.

Mr. PETERS.—To which ruling of the Court we respectfully except in both instances.

(Exception allowed.)

The COURT.—The objection to the cross-examination of A. V. Gere occurring on April 27, 1914, is sustained.

Mr. PETERS.—To which we respectfully except.  
(Exception allowed.)

Mr. LYMER.—In view of the Court's ruling, I should like to move for judgment at this time on the following grounds:

1. On the ground that the evidence introduced by defendant, being evidence solely of an alleged title outstanding in a stranger to this suit, does not con-



stitute a defense to the plaintiff's *prima facie* case against defendant.

2. On the ground that the evidence introduced by defendant in opposition to plaintiff's *prima facie* case is not available to defendant, he being estopped to show any outstanding title in a stranger to this controversy and being limited to a showing of a superior title in himself as against plaintiff, and having offered no evidence showing or tending to show a title in defendant superior to plaintiff's title, plaintiff is entitled to judgment herein.

3. That the evidence offered by defendant, even if available to him, is not sufficient to meet and controvert plaintiff's *prima facie* showing in this case, in that the transfers by defendant to John K. Sumner in 1906, put in evidence by defendant, do not operate to deprive the trustee [186] under the Sumner trust deed of his power to effectuate leases on the premises in question, nor is there any evidence, independent of said documents of transfer showing or tending to show that the lease for years which is the subject of this litigation was invalidly created or improperly assigned, as to a portion thereof, to the plaintiff herein.

Mr. PETERS.—None of these questions of law are involved. The Court has sustained the objections.

(Argument.)

Mr. LYMER.—I believe counsel is correct and the motion is withdrawn.

The COURT.—The Court finds for the plaintiff for an undivided half of the term of years set out in the complaint herein.



Mr. PETERS.—To which we respectfully except on the ground that the decision of the Court is against the law and the evidence and the weight of the evidence.

The COURT.—Exception allowed.

(Adjourned *sine die.*) [187]

I CERTIFY that the foregoing is a full, true, and correct transcript of my stenographic notes taken on the trial of the above-entitled case.

H. R. JORDAN,

Official Shorthand Reporter.

Honolulu, August 4, 1914.

[Endorsed]: Circuit Court, First Circuit, Territory of Hawaii. Fred Harrison vs. Robt. Wyllie Davis. Transcript of Evidence. Filed Aug. 4, 1914. A. K. Aona, Clerk.

No. 814. Rec'd and filed in the Supreme Court, Nov. 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [188]

**[Plaintiff's Exhibit "A"—Lease.]**

Stamped \$2.

This Indenture of Lease made this 1st day of June A. D. 1910, between John D. Holt, Trustee of Honolulu, City and County of Honolulu, Territory of Hawaii, lessor, and A. V. Gear of the same place, lessee,

Whereas, on the 16th day of August, 1892, by a certain deed of trust recorded in the Register Office, Oahu, in Liber 136 pages 313-314, John K. Sumner of the City and County of Honolulu, Territory of Hawaii conveyed unto Bruce Cartwright of the same

place, certain land situated at Koolaupoko, Island of Oahu, known as the land of Mokapu, in trust, nevertheless, among other things, to pay the rents, issues and profits arising from or out of said land as directed in said deed of trust.

And whereas, the said John D. Holt was duly appointed and substituted to act as trustee in said deed of trust, in the place and stead of the said Bruce Cartwright and at the instance of the said Bruce Cartwright by an order of a Judge of the First Circuit Court of the said Territory of Hawaii. Now this Indenture witnesseth:

That the said lessor doth hereby lease and demise unto said lessee all of that certain piece or parcel of land aforesaid situated at Koolaupoko, Island of Oahu, and known as the land of Mokapu and more particularly described in said aforementioned deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313-314.

To have and to hold the same with all the rights, privileges and appurtenances thereunto belonging or in anywise [189] appertaining, unto the said lessee, his executors, administrators and assigns for and during the term of Twenty-five years from the First day of June, A. D. 1910.

Yielding and paying therefor rent as follows:

For the First year the rental shall be free;

For the next ensuing four years the rent shall be at the rate of Three Hundred (\$300.00) Dollars per year, payable semi-annually in advance.

For the next ensuing five years the rent shall be at the rate of Four Hundred (\$400.00) Dollars per

year, payable semi-annually in advance.

For the remaining fifteen years the rent shall be at the rate of Five Hundred (\$500.00) Dollars per year, payable semi-annually in advance.

And the said lessor hereby covenant with said lessee that he, paying said rent as aforesaid, shall have peaceable and quiet possession of said land during said term.

And the said lessee hereby covenants with said lessor that he will pay said rent in manner aforesaid, together with all taxes or assessments which may be assessed against said land.

In witness whereof, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals the day and year first above written.

JNO. D. HOLT,  
Trustee.

A. V. GEAR.

**[Plaintiff's Exhibit "A"—Consent and Confirmation of Lease by Davis et ux. Dated June 1, 1910, Between Holt, Trustee, and Gear.]**

KNOW ALL MEN BY THESE PRESENTS, that I, Robert Wyllie Davis of Mokapu, Koolaupoko, Island of Oahu, and I, Mary [190] Kealohanui Davis wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms of the aforementioned Deed of Trust.

ROBERT WYLLIE DAVIS.

Territory of Hawaii,  
City and County of Honolulu,—ss.

On this 13th day of July, 1910, before me personally appeared John D. Holt, Trustee, and A. V. Gear, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

WILLIAM SAVIDGE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

Territory of Hawaii,  
City and County of Honolulu,—ss.

On this 4th day of August, 1910, before me personally appeared Robert Wyllie Davis, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

WILLIAM SAVIDGE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

**[Plaintiff's Exhibit "A"—Assignment of Lease by  
A. V. Gear to C. A. Peterson, October 12, 1910.]**

Stamped \$2.

I, A. V. Gear of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee named in the foregoing lease, in consideration of One Dollar and of the covenants hereinafter contained, do hereby assign, transfer and set over to C. A. Peterson of said Honolulu, the foregoing lease, the prem-



ises thereby demised, and all right, title and interest in and under the same. And I, the said assignee, in consideration [191] of the foregoing assignment, hereby covenant with the said assignor that I will pay the rent which may hereafter become due according to the terms of said lease, and perform all of the covenants and stipulations in said lease contained which are to be performed by the lessee.

In witness whereof the parties hereto have hereunto and to another instrument in duplicate of like w.s. tenor and date, interchangeably set their hands and seals this 12th day of Oct. A. D. 1910.

A. V. GEAR.

CHAS. A. PETERSON.

The date in the last line of the foregoing instrument was changed to "12th day of Oct." prior to acknowledgment hereof.

WILLIAM SAVIDGE.

**[Plaintiff's Exhibit "A"—Assignment of Lease by  
C. A. Peterson to Addie B. Gear, October 12,  
1910.]**

Stamped \$2.

I, C. A. Peterson of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee by assignment of the foregoing lease, in consideration of One Dollar and of the covenants hereinafter contained do hereby assign, transfer and set over to Addie B. Gear of said Honolulu, the foregoing lease, the premises thereby demised, and all the right, title and interest which I have in and under the same. And I, the said assignee, in consideration of the fore-



going assignment, hereby covenant with the said assignor that I will pay the rent which may hereafter become due according to the terms of said lease, and perform all of the covenants and stipulations in said lease contained which are to be performed by the lessee.

In witness whereof, the parties hereto have hereunto and to another instrument in duplicate of like w.s. tenor and date, interchangeably set their hands and seals this 12th day of [192] Oct. A. D. 1910.

CHAS. A. PETERSON.

ADDIE B. GEAR.

The date in the last line of the foregoing instrument was changed to "12th day of Oct." prior to acknowledgment hereof.

WILLIAM SAVIDGE.

Territory of Hawaii,  
City and County of Honolulu,—ss.

On this 14th day of October, 1910, before me personally appeared A. V. Gear, Chas. A Peterson and Addie B. Gear, to me known to be the persons described in and who executed the two foregoing instruments and acknowledged that they executed the same as their free act and deed.

WILLIAM SAVIDGE,

Notary Public, First Judicial Circuit, Territory of  
Hawaii.

**[Plaintiff's Exhibit "A"—Assignment of Lease by  
C. A. Peterson to Addie B. Gear, October 12,  
1910.]**

Stamped \$2.

I, Addie B. Gear of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee by assignment of the foregoing lease, in consideration of One Dollar to me in hand paid, do hereby assign, transfer and set over to Fred Harrison of said Honolulu, the foregoing lease, the premises thereby demised, and all of the right, title and interest which I have in and under the same, which is an undivided half interest.

In witness whereof I have hereunto set my hand and seal this 21st day of October, A. D. 1910.

**ADDIE B. GEAR.**

City and County of Honolulu,  
Territory of Hawaii,—ss.

On this 15th day of November, A. D. 1910, before me personally appeared Addie B. Gear, to me known to be the person described in and executed the foregoing [193] instrument, and acknowledged that she executed the same as her free act and deed.

**ANTONE MANUEL,**

Notary Public, First Circuit, Territory of Hawaii.

Entered of record this 6th day of May, A. D. 1911, at 10:53 o'clock A. M., and compared. Chas. H. Merriam, Registrar of Conveyances.

OFFICE OF  
THE  
REGISTRAR OF CONVEYANCES.

Honolulu, Hawaii, Oct. 31, 1911.

The foregoing is a true copy of record, recorded in the office of the Registrar of Conveyances of the Territory of Hawaii in Book 343, pages 347-351.

[Seal]                      Attest: CHAS. H. MERRIAM,  
Registrar of Conveyances for the Territory of  
Hawaii.

[Endorsed]: "B." Certified Copy Lease and Assignments. John K. Sumner by Tr. to A. V. Gear. Dated June 1, 1910. Recorded in Book 343, pages 347-351. Registry of Conveyances for the Territory of Hawaii, at Honolulu.

L. No. 7783. Received in Evidence Oct. 17, 1913, and marked Plff's Exhibit "A" Identification. A. K. Aona, Clerk.

L. No. 7695. Received in Evidence June 5th, 1913, and marked Plaintiff's Exhibit "A." J. Marcallino, Clerk.

No. 757. Received and filed January 14, 1914, in the Supreme Court, at 8:40 o'clock A. M. J. A. Thompson, Clerk.

No. 814. Rec'd and filed in the Supreme Court November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [194]

**[Plaintiff's Exhibit "C"—Assignment of Lease,  
June 6, 1913, Addie B. Gear to Fred Harrison.]**

THIS INDENTURE made this 6th day of June, A. D. 1913, between ADDIE B. GEAR, of Honolulu,

City and County of Honolulu, Territory of Hawaii, party of the first part, and FRED HARRISON, of Honolulu aforesaid, party of the second part:

WITNESSETH.

WHEREAS, said party of the first part by that certain Assignment dated October 21, 1910, and recorded in Liber 343 at page 351 of the Hawaiian Registry of Conveyances in said Honolulu, did assign unto said party of the second part all her right, title and interest in and to that certain leasehold for the term of twenty-five (25) years on that certain land situate at Koolaupoko, Oahu, Territory of Hawaii, known as the land of Mokapu, said leasehold having been originally created by Deed of John D. Holt, Trustee, to A. V. Gear, by that certain Indenture of Lease dated June 1, 1910, and recorded in said Registry in Liber 343 at page 347; and,

WHEREAS, by that certain agreement in writing dated October 24, 1910, but executed simultaneously with said Assignment above referred to the said party of the second part covenanted and agreed with the said party of the first part that he would reconvey said premises covered by said Assignment in the event that certain promissory notes in said Agreement described should be fully met and paid by said A. V. Gear on or before December 31, 1911, and that said party of the second part should be fully reimbursed for any other and additional sums of money by him advanced on account of said promissory notes; and,

WHEREAS, said promissory notes were not paid



prior to [195] said 31st day of December, 1911, and have not been paid to date, and the party of the first part herein and said A. V. Gear are both unable to meet the payments called for by said Agreement of October 24, 1910;

NOW, THEREFORE, the said party of the first part, in consideration of the premises and of the sum of One (\$1.00) Dollar to her paid by said party of the second part, receipt whereof is hereby acknowledged, does hereby transfer, assign, set over and convey all of her right, title and interest, both legal and equitable, in and to the real estate described in said lease of June 1, 1910, and thereafter, by mesne conveyances vested in said party of the first part, and all her right, title and interest in said Indenture of Lease unto said party of the second part, his executors and assigns, to have and to hold the same for the entire unexpired term of said lease.

And said party of the second part hereby covenants with said party of the first part that he will pay the rent which may hereafter become due according to the terms of said lease and perform all of the covenants and stipulations in said lease contained which are to be performed by the lessee.

IN WITNESS WHEREOF, the parties hereto have hereunto set their respective hands the day and year first above written.

ADDIE B. GEAR. (Seal)

FRED HARRISON. (Seal)



Territory of Hawaii,  
City and County of Honolulu,—ss.

On this 6th day of June, A. D. 1913, before me [196] personally appeared Addie B. Gear and Fred Harrison, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[Seal] J. R. KENNY,  
Notary Public First Judicial Circuit, Territory of  
Hawaii.

[Endorsed]: C. L. 7783. Recd. in evidence Oct. 17, 1913, and marked Plaintiff's Ex. "C." J. Marcallino, Clerk.

No. 757. Rec'd and filed January 14, 1914, in the Supreme Court, at 8:40 o'clock A. M. J. A. Thompson, Clerk.

No. 814. Received and filed in the Supreme Court November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [197]

**[Plaintiff's Exhibit "D"—Quitclaim Deed, June 9, 1913, Cecil Brown, Trustee, to Fred Harrison.]**

THIS INDENTUDE made this 9th day of June, A. D. 1913, by and between CECIL BROWN, Trustee, of Honolulu, City and County of Honolulu, Territory of Hawaii, party of the the first part, and FRED HARRISON, also of said Honolulu, Territory of Hawaii, party of the second part:

WITNESSETH:

That the said party of the first part for and in consideration of the sum of One Dollar (\$1.00) to him

paid by said party of the second part, the receipt whereof is hereby acknowledged, does hereby remise, release and forever quitclaim unto the said party of the second part all his right, title and interest in and to the undivided one-half ( $1\frac{1}{2}$ ) interest of Addie B. Gear in and to that certain Indenture of Lease made by and between John D. Holt, trustee, and A. V. Gear, dated June 1, 1901, and recorded in Liber 343 at pages 347-351 of the Hawaiian Registry of Conveyances of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Being the property conveyed to said party of the first part by deed of Job Batchelor, Commissioner, dated February 29, 1912, and recorded in said Registry in Liber 366 at pages 140, 141.

TO HAVE AND TO HOLD the same unto the said party of the second part, his successors and assigns to his and their own use and behoof forever.

IN WITNESS WHEREOF, said party of the first part has hereunto set his hand and seal the day and year first hereinabove written.

CECIL BROWN. (Seal)

In presence of

W. A. DICKSON. [198]

Territory of Hawaii,

City and County of Honolulu,—ss.

On this 8th day of October, A. D. 1913, before me personally appeared Cecil Brown, *know* to me to be the person described in and who executed the foregoing instrument and acknowledged that he executed

the same as his free act and deed as said Trustee.

[Seal]

J. R. KENNEY,

Notary Public, First Judicial Circuit, Territory of  
Hawaii.

[Endorsed]: D. L. No. 7783. Received in Evidence Oct. 17, 1913, and Marked Plff's Exhibit "D."  
A. K. Aona, Clerk.

No. 757. Rec'd and filed January 14, 1914, in the Supreme Court at 8:40 A. M. J. A. Thompson, Clerk.

No. 814. Rec'd and filed in the Supreme Court, November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [199]

**[Plaintiff's Exhibit "E"—Assignment of Lease,  
June 16, 1910, A. V. Gear to Robert Wyllie  
Davis.]**

KNOW ALL MEN BY THESE PRESENTS, that I, A. V. Gear of Honolulu, city and county of Honolulu, Territory of Hawaii, lessee under a certain Indenture of Lease between John D. Holt, trustee, of said Honolulu lessor and the said A. V. Gear as lessee, dated the first day of June A. D. 1910, wherein the said lessor leases to the said lessee the land of Mokapu as therein described for a term of Twenty-five years on certain terms and conditions therein set forth;

Now I, the said A. V. Gear for and in consideration of the sum of One (\$1.00) Dollar to me in hand paid by Robert Wyllie Davis of Mokapu, Koolaupoku, city and county of Honolulu, Territory of Hawaii, the receipt whereof is hereby acknowledged,

and the undertaking of the said Robert Wyllie Davis to observe all the conditions and covenants to be observed and performed by the lessee in the aforementioned lease jointly with the said A. V. Gear, do hereby sell, assign, transfer, and set over unto the said Robert Wyllie Davis an undivided one-half interest in the said lease and in the use of the premises thereby leased and in the profits to be derived therefrom for the whole of the term of said lease,

TO HAVE AND TO HOLD the same with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining, unto the said Robert Wyllie Davis, his executors, administrators and assigns for and during the term of Twenty-five years from the first day of June, A. D. 1910.

IN WITNESS WHEREOF, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals this 16th day of June, A. D. 1910.

A. V. GEAR.

I, John D. Holt, Trustee, lessor, hereby consent to the above assignment by the lessee of an undivided half interest in the aforementioned lease.

JOHN D. HOLT.

Honolulu, June 16th, 1910. [200]

[Endorsed]: Plff's Ex. "E." L. No. 7783. Received in Evidence Oct. 17, 1913, and Marked Plff's Exhibit "E." A. K. Aona, Clerk.

No. 757. Received and filed in the Supreme Court, January 14, 1914, at 8:40 A. M. J. A. Thompson, Clerk.



No. 814. Rec'd and filed in the Supreme Court, November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [201]

**[Defendant's Exhibit 1 — Assignment of Lease, October 24, 1910—Fred Harrison to Addie B. Gear.]**

THIS INDENTURE made this 24th day of October, A. D. 1910, by and between Fred Harrison of Honolulu, city and county of Honolulu, Territory of Hawaii, and Addie B. Gear of Honolulu aforesaid,

WITNESSETH:

That whereas said Fred Harrison has this day endorsed those two certain promissory notes executed by A. V. Gear of even date herewith, one in the sum of \$1767.35 and payable six months from date thereof and one in the sum of \$1760.00 and payable in twelve months from the date thereof, both payable to the order of John K. Sumner and both bearing interest at the rate of 8% per annum.

And whereas in order to partly secure said Fred Harrison said Addie B. Gear has assigned to Fred Harrison that certain Indenture of Lease of the land of 'Mokapu,' made by and between John D. Holt, Trustee and A. V. Gear and dated June 1st, 1910; the interest of said Addie B. Gear in said Indenture of Lease being an undivided half-interest.

NOW THIS INDENTURE WITNESSETH, That I the said Fred Harrison hereby agree to assign over, transfer and set over to said Addie B. Gear said Indenture of Lease of the land of 'Mokapu,' provided that those two certain promissory notes



executed by A. V. Gear of even date herewith and endorsed by me, one in the sum of \$1767.35 and payable six months from date thereof and one in the sum of \$1767.00 and payable in twelve months from the date thereof, both payable to the order of John K. Sumner and both bearing interest at the rate of 8% per annum are fully met and paid by the said A. V. Gear and that I am fully reimbursed on or before the 31st day of December, 1911, for any sums of money that I have to pay out by reason of or on account of said endorsements, together with interest thereon at the rate of 8% per annum. It being further agreed and understood however, that in the event of said promissory notes being paid in full on or before the dates thereof, or that I am fully reimbursed on or before the 31st day of December, A. D., 1911 for any sums of money that I have to pay out by reason of said endorsements, that I am still entitled to receive and have for the full term of said Lease one-half of the profits accruing or derived under said lease, and it is further understood and agreed that I the said Fred Harrison am not to be called [202] upon or be compelled to contribute or pay any sum or sums of money towards or on account of any business carried on upon the land described in said lease, or be compelled to contribute towards or to pay any share in any losses incurred in any business carried on upon said land of 'MOKAPU.'

And I the said Addie B. Gear in consideration of the premises and of the sum of one dollar to me paid the receipt whereof is hereby acknowledged, do

hereby agree that upon the assignment to me of the Lease hereinbefore mentioned, that I will and my heirs, administrators, executors and assigns shall for and during the full term of said lease pay over to said Fred Harrison one-half of the *profits* derived under the said lease, and further that I will not demand of said Fred Harrison any sum or sums of money towards carrying on any business whatsoever upon said land of 'Mokapu,' or on account of the payment of any losses incurred in any business conducted or carried on upon said land.

In Witness whereof the said Fred Harrison and said Addie B. Gear have hereunto and to another instrument of even date and tenor, set their hands and seals the day and year first above written.

FRED HARRISON.

ADDIE B. GEAR.

City and County of Honolulu,  
Territory of Hawaii,—ss.

On this 24th day of October, A. D., 1910, before me personally appeared Fred Harrison, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

[Seal]

ANTONE MANUEL,

Notary Public, First Circuit, Territory of Hawaii.

City and County of Honolulu,  
Territory of Hawaii,—ss.

On this 15th day of November, A. D., 1910, before me personally appeared Addie B. Gear, to be known to be the person described in and who executed the

foregoing instrument and acknowledged that she *exxcutd* the same as her free act and *de* deed.

[Seal]

ANTONE MANUEL,

Notary Public, 1st Circuit, Territory of Hawaii.

[203]

[Endorsed]: L. No. 7783. Received in Evidence Oct. 17, 1913, and Marked Deft's Exhibit 1. A. K. Aona, Clerk.

No. 757. Received and filed in the Supreme Court, January 14, 1914, at 8:40 A. M. J. A. Thompson, Clerk.

No. 814. Rec'd and filed in the Supreme Court, November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [204]

**[Defendant's Exhibit 2—Assignment of Lease, November 16, 1910—A. V. Gear to Fred Harrison.]**

THIS INDENTURE, made this 16th day of November, A. D. 1910, by and betwen A. V. Gear, of Honolulu, City and County of Honolulu, Territory of Hawaii, of the first part, and Fred Harrison, of Honolulu aforesaid, party of the second part,

WITNESSETH:

THAT WHEREAS *aaïd* Fred Harrison on the 24th day of October, A. D. 1910, did endorse those two certain promissory notes executed by A. V. Gear on said 24th day of October, A. D. 1910, one in the sum of Seventeen Hundred and Sixty-seven Dollars and Thirty-five Cents (\$1,767.35), and payable six months from date thereof, and one in the sum of Seventeen Hundred and Sixty-seven Dollars (\$1,767.-

00), payable in twelve months from the date thereof, both payable to the order of John K. Sumner and both bearing interest at the rate of eight per cent per annum;

AND WHEREAS in order to partly secure said Fred Harrison said A. V. Gear is desirous and willing to convey to said Fred Harrison certain property, crops, machinery and utensils now being and situated on the land of "Mokapu" as described in that certain Indenture of Lease made by and between John D. Holt, Trustee, as Lessor, and A. V. Gear as Lessee, dated June 1st, A. D. 1910:

NOW THIS INDENTURE WITNESSETH:

THAT said A. V. Gear, in consideration of the premises and the sum of One Dollar to him paid, the receipt whereof is hereby acknowledged, doth hereby assign, transfer, set over and convey unto said Fred Harrison, all the right, title and interest which said A. V. Gear may have in and to the land of "Mokapu" as described in that certain Indenture of Lease made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1st, A. D. 1910, together with all growing crops, harvested crops, machinery, tools, buildings, live stock of all kinds [205] and description, plows, harnesses, boats and all personal property of whatsoever kind and nature.

TO HAVE AND TO HOLD unto the said Fred Harrison, his heirs, administrators and assigns, to his and their own behoof forever.

PROVIDED ALWAYS that if said A. V. Gear shall pay to said John K. Sumner those two certain



promissory notes executed by A. V. Gear on the 24th day of October, A. D. 1910, one in the sum of \$1,767.35, and payable six months after date thereof, and one in the sum of \$1,767.00, and payable in twelve months from the date thereof, both payable to the order of said John K. Sumner, and shall further reimburse said Fred Harrison, before the 31st day of December, A. D. 1911, for all sums of money paid out on account of or by reason of said endorsements, and shall observe and perform all of the covenants herein contained and on the part of said A. V. Gear to be performed, then these presents shall be void. But upon failure of said A. V. Gear to reimburse said Fred Harrison on or before the 31st day of December, A. D. 1911, for all moneys paid out by said Fred Harrison by reason of said endorsements, or upon the breach by A. V. Gear of any condition herein contained, then said Fred Harrison is hereby expressly authorized and empowered to take possession of said land of Mokapu and all growing crops, harvested crops, machinery, tools, buildings, live stock of all kinds and description, plows, harnesses, boats and all personal property of whatsoever kind and nature, and may retain the same, or sell the same at Public Auction, either as a whole or in parcels, at public auction at such time and place as to said Fred Harrison may seem best, and in his own name or as the attorney in fact of said A. V. Gear, hereby irrevocably constituted and appointed, may execute, acknowledge and deliver all necessary bills of sale and other instruments, give good [206] and valid receipts for the purchase money and do and perform



such other acts as he may deem necessary fully to convey the same premises unto the purchaser or purchasers thereof, and otherwise to carry into effect this power of sale.

Said Fred Harrison to apply the proceeds of sale first to the costs and expenses of sale and foreclosure, together with a counsel's fee, second to the costs and expenses of seizure, possession and removal before sale, if made or taken, third, to the payment of all moneys which shall then be owing to said Fred Harrison on any and every account, whether the same shall or shall not be then due, and the remainder, if any, pay over to said A. V. Gear, his administrators or assigns.

And said A. V. Gear hereby covenants and agrees with said Fred Harrison, his administrators and assigns, as follows:

1. That he will pay to said John K. Sumner the notes herein referred to when due, and will pay to said Fred Harrison on or before the 31st day of December, A. D. 1911, all sums of money paid out by him on account of or for said endorsements.

2. That he will diligently and in a proper manner care for and harvest all crops, animals and all other property intended to be conveyed by this instrument, and will not request of said Fred Harrison any compensation or salary for so doing.

3. That he will monthly render to said Fred Harrison a statement of all receipts and expenditures on account of said premises and property intended to be conveyed by this instrument.

4. That in the event of said Fred Harrison be-



No. 814. Rec'd and filed in the Supreme Court November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [208]

**[Equity Record No. 1293, in Circuit Court, Territory of Hawaii, in re Trust Deed of John K. Sumner.]**

*Circuit Court, First Circuit.*

IN EQUITY.

In the Matter of the Trust Deed of JOHN K. SUMNER.

To the Hon. A. S. Humphreys, First Judge of the Circuit Court, of the First Circuit:

The petition of Robert Wyllie Davis, *cestui qui* trust, respectfully *shews* to the Court that heretofore, to wit: on the 16th day of August, 1892, one John K. Sumner, then residing in Honolulu, Island of Oahu, made and executed a deed of certain land known as Mokapu, situate in the District of Koolau-poko, on the Island of Oahu, to Bruce Cartwright, upon certain trusts specified in said deed, and which enure for the use and benefit of your petitioner, which said Deed of Trust is of record in the Office of the Registrar of Conveyances in Liber 136 on page 313 et seq. That said Bruce Cartwright has resigned said office of Trustee under said deed, and wishes to be relieved of the duties incumbent on him thereunder. That the resignation of said Bruce Cartwright is filed herewith and made a part of this petition.

Wherefore your petitioner prays that a new Trustee be appointed in the place and stead of said Bruce Cartwright, to do and perform all the acts, powers

and authority that may be exercised and required under said Deed, and to that end suggests and nominates to this Honorable Court John D. Holt, Jr., as successor to the said Bruce Cartwright.

Dated, Honolulu, August 22d, 1902.

R. W. DAVIS. [209]

Island of Oahu,  
City of Honolulu,—ss.

R. W. Davis, being duly sworn, deposes and says that he has read the foregoing petition, and that the contents thereof are true.

R. W. DAVIS.

Subscribed and sworn to before me this 22d day of August, A. D. 1902.

[Seal]

GEO. L. BIGELOW,  
Notary Public.

[Endorsed]: E. #1293. Circuit Court, First Circuit. In Equity. In the Matter of the Trust Deed of John K. Sumner. Petition of *cestui qui* trust to appoint a new Trustee. Filed August 25, 1902. J. A. Thompson, Clerk. Cecil Brown, Attorney for Petitioner, 93 Merchant St. [210]

**[Resignation of Bruce Cartwright as Trustee of the  
Deed of Trust of John K. Sumner.]**

*Circuit Court, First Circuit.*

IN EQUITY.

In the Matter of the Trust Deed of J. K. SUMNER.

And now comes Bruce Cartwright, Trustee, and appointed as such under that certain deed of trust made by John K. Sumner, of record in Liber 136 on



page 313, and resigns and relinquishes the offices, powers and duties of trustee thereunder.

Dated, Honolulu, August 22d, 1902.

BRUCE CARTWRIGHT,

Trustee.

[Endorsed]: E. #1293. Circuit Court, First Circuit. In Equity. In the Matter of the Trust Deed of John K. Sumner. Resignation of Trustee. Filed August 25, 1902. J. A. Thompson, Clerk. [211]

**[Order Appointing New Trustee Under Deed of  
Trust of John K. Sumner.]**

*Circuit Court, First Circuit.*

IN EQUITY.

In the Matter of the Trust Deed of JOHN K. SUMNER.

Upon reading and filing the petition of Robert Wyllie Davis, praying that John D. Holt, Jr., be appointed in the place and stead of Bruce Cartwright, resigned, as Trustee, of that certain deed made by John K. Sumner, dated August 16th, 1892, and of record in Liber 136 on page 313, and after hearing counsel thereon,

IT IS ORDERED, ADJUDGED AND DECREED, that John D. Holt, Jr., of Honolulu, in the Island of Oahu, and Territory of Hawaii, be and he is hereby appointed trustee of said deed above set forth, and to have and hold such office with all the power and authority as was heretofore had by the said Bruce Cartwright, resigned, by virtue of his appointment thereunder.



Dated, Honolulu, August 29, 1902.

GEO. D. GEAR,  
2d Judge Circuit Court.

[Endorsed]: Circuit Court, First Circuit. In Equity. In the Matter of the Trust Deed of John K. Sumner. Order Appointing New Trustee. Filed Aug. 29/02. Frank H. Loucks, Clerk. [212]

**[Trust Deed, August 16, 1892, John K. Sumner, to  
Bruce Cartwright.]**

Stamped \$1.00.

THIS INDENTURE made this 16th day of August, A. D. 1892, between JOHN K. SUMNER, of Tahiti, but at present residing in Honolulu in the Island of Oahu, the party of the first part, and BRUCE CARTWRIGHT, of said Honolulu, the party of the second part: WINESSETH: That the said party of the first part for and in consideration of the sum of ONE DOLLAR to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold and by these presents does grant, bargain and sell unto the said party of the second part that certain piece or parcel of land situate, lying and being in the District of Koolaupoko Island of Oahu, and known as MOKAPU, more particularly described as follows:

Commencing at the Hala Tree on the sea coast marked on the plan the boundary runs along that of the land of Kaneohe; North 54° 54' East 6990 Six Thousand Nine Hundred and Ninety feet; thence North 23° 45' West 1664 Sixteen Hundred and Sixty Four feet to sea coast; thence round sea coast as

shown on plan to commencement, and containing an area of 434-6/10 acres; and being the same premises conveyed to Wm. and John Sumner by deed of record in Liber 7 on pages 356 & 357.

Together with all and singular the easements tenements hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion or reversions remainder or remainders rents issues and profits thereof, and also all the estate right title and interest thereon or thereto.

TO HAVE AND TO HOLD the same unto the said party of the second part, and his heirs, and assigns forever, but in trust nevertheless for the uses and purposes herein set forth, that is to say:

In the first place to pay the rents issues and profits arising therefrom or thereout so long as the lease now in existence is in force, to me the said party of the first part, and upon the expiration of the present lease or other sooner determination thereof to pay the rents issues and profits arising from or out of said land to my nephew Robert Wyllie Davis during the term of his natural life, [213] or in the discretion of said Robert Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing or agricultural purposes.

And in the second place from and after the death of the said Robert Wyllie Davis to convey the said premises to the heirs of the body of said Robert W. Davis lawfully begotten and failing such heirs of his body, then to the wife if living of the said Robert W. Davis and failing such wife, then to convey the said premises unto the heirs at law of the said Robert W.

Davis share and share alike.

In Witness Whereof I have hereunto set my hand and seal the day and year first above written.

JOHN K. SUMNER.

In the presence of C. F. PETERSON.

Hawaiian Islands,  
Island of Oahu,—ss.

On this 16th day of August, A. D. 1892, personally appeared before me, John K. Sumner, known to me to be the person described in and who executed the foregoing instrument, who acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein set forth.

CHARLES F. PETERSON,

Notary Public.

Recorded and Compared this 17th day of August, A. D. 1892, at 2:11 o'clock P. M.

MALCOLM BROWN,

Deputy Registrar of Conveyances.

REGISTER OFFICE.

Honolulu, H. I., June 13th, 1902.

I hereby certify the foregoing to be a true and correct copy of an instrument on Record in this office, in Liber 136 on pages 313 and 314 of Miscellaneous Records.

THOS. G. THRUM,

Registrar of Conveyances. [214]

[Endorsed]: Number 1293. Equity Division. Circuit Court, First Circuit. In the Matter of the Trust Deed of John K. Sumner. 1902. Entered in Docket Vol. —, page —, Record Vol. — page —. J. A. Thompson, Clerk.

No. 757. Received and filed in the Supreme Court, January 14, 1914, at 8:40 A. M. J. A. Thompson, Clerk.

No. 814. Rec'd and filed in the Supreme Court, November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [215]

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*In the Circuit Court of the First Judicial Circuit for  
the Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

(Stamped \$2.00)

FRED HARRISON,

Plaintiff,

versus

A. V. GEAR and ADDIE B. GEAR, His Wife,  
Defendants.

**Bill of Complaint.**

To the Honorable Presiding Judge of Said Court, at  
Chambers, in Equity:

Fred Harrison of the city and county of Honolulu, Territory of Hawaii, plaintiff herein, brings this his Bill of Complaint, against A. V. Gear and Addie B. Gear, his wife, both of said Honolulu, defendants herein, and alleges and charges as follows:

I.

That the defendants are both residents of said Honolulu.

II.

That on or about June 1, 1910, John D. Holt, Jr., Trustee, demised and leased to defendant A. V. Gear, for the term of twenty-five (25) years from said June



1, 1910, certain land situate in the District of Koolaulapoko, Island of Oahu, Territory of Hawaii, called and known as the land of Mokapu, containing an area of about 434.6 acres, by an indenteure in [216] writing dated June 1, 1910, and recorded in Liber 343, page 345, a copy of which said lease marked exhibit "A," is hereto attached and made a part hereof.

### III.

That said lease for a valuable consideration and by sundry mesne conveyances was thereafter duly assigned to plaintiff who is now the lessee of said land of Mokapu.

### IV.

That defendant, A. V. Gear, entered upon said land so leased as aforesaid, took possession thereof, and planted cotton on about thirty-five (35) acres thereof.

### V.

That on November 16, 1910, plaintiff and defendant, A. V. Gear, entered into a certain agreement, a copy of which marked exhibit "B," is hereto attached and made a part hereof.

### VI.

That on June 9, 1911, plaintiff and defendants, A. V. Gear and Addie B. Gear, entered into a certain agreement, a copy of which marked exhibit "C," is hereto attached and made a part hereof.

### VII.

That pursuant to said agreements, plaintiff advanced to defendants, A. V. Gear and Addie B. Gear, certain sums of money for the purposes therein stated, amounting to \$7,186.07.



## VIII.

That said defendants have failed and neglected to repay plaintiff said sums of money so advanced as aforesaid, save and except the sum of \$3,438.00, although demand therefor has been made, and that the sum of \$3,748.07 is now due and owing plaintiff by defendants, A. V. Gear and Addie B. Gear. [217]

## IX.

That a certain amount of cotton has been taken off the aforesaid land and baled, amounting to about thirty-five (35) bales, and is now stored on said land.

## X.

That under and by virtue of said agreements, plaintiff was given a first lien on said bales of cotton and growing crops of cotton on said land.

## XI.

That by reason of the failure to pay said money and interest thereon as stipulated and agreed, the defendants are in default and the plaintiff, as hereinabove appears is entitled to foreclose the lien created by said exhibits and to sell the premises therein described.

Wherefore plaintiff prays:

(1). That the process of this court issue as provided by law summoning the defendants to appear and answer this complaint;

(2). That the plaintiff have judgment against the defendant A. V. Gear for the sum of \$3,748.07;

(3). That the gross amount due on said debt with interest up to the date of judgment herein be ascertained by your Honor and that the said lien be foreclosed according to law and the practice of this

Honorable Court; and that the defendants or any person whatsoever claiming by, through or under them be forever barred and foreclosed from all right, title, interest, claim, demand, or equity of redemption in and to the said mortgaged premises, so to be foreclosed, or any part thereof;

(4). That said premises be sold at auction according to law and the practice of this Honorable Court and that a [218] Commissioner be appointed by your Honor to effectuate said sale and that the plaintiff may, if he so elect, become a purchaser at said sale.

(5). That the proceeds of this sale be applied to pay:

(a). The costs of this proceeding;

(b). The expenses of said sale and a reasonable fee to the Commissioner;

(c). A reasonable fee to the plaintiff's counsel in this behalf;

(d). The principal and interest of said loan;

(e). That plaintiff may have such other and further relief as may be just and equitable and as the premises may require.

FRED HARRISON,  
Plaintiff.

By WILLIAM T. RAWLINS.

Dated, Honolulu, January 20th, 1912.

[Endorsed]: Filed Jan. 20, 1912, 10 o'clock A. M.  
J. A. Dominis, Clerk. [219]

Territory of Hawaii,

City and County of Honolulu,—ss.

W. T. Rawlins, being first duly sworn, on oath de-

poses and says: That he is the attorney for the plaintiff in the foregoing Bill of Complaint, and makes this affidavit for said plaintiff, by his authority and on his behalf; that he has read the said bill of complaint, knows the contents thereof and that the same is true.

WILLIAM T. RAWLINS.

Subscribed and sworn to before me this 20th day of January, A. D. 1912.

[Seal]

J. A. DOMINIS,

Clerk Circuit Court,

J. A. D. ~~Notary Public~~, First Judicial Circuit, Territory of Hawaii.

[Endorsed]: Filed Jan. 20, 1912, 10 o'clock A. M.  
J. A. Dominis, Clerk. [220]

**[Exhibit "A" to Complaint—Lease Between John D. Holt, Trustee, and A. V. Gear, June 1, 1910.]** ..

Stamped \$2.

This Indenture of Lease made this 1st day of June, A. D. 1910, between John D. Holt, Trustee, of Honolulu, City and County of Honolulu, Territory of Hawaii, Lessor, and A. V. Gear of the same place, Lessee.

Whereas, on the 16th day of August, 1892, by a certain deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313-314, John K. Sumner of the City and County of Honolulu, Territory of Hawaii, conveyed unto Bruce Cartwright of the same place, certain land situated at Koolaupoko, Island of Oahu, known as the land of Mokapu, in trust, nevertheless, among other things, to pay the rents, issues

and profits arising from or out of said land as directed in said deed of trust.

And Whereas, the said John D. Holt was duly appointed and substituted to act as trustee in said deed of trust, in the place and stead of the said Bruce Cartwright and at the instance of the said Bruce Cartwright by an order of a Judge of the First Circuit Court of the said Territory of Hawaii, Now this Indenture Witnesseth:

That the said Lessor doth hereby lease and demise unto said Lessee all of that certain piece or parcel of land aforesaid situated at Koolaupoko, Island of Oahu, and known as the land of Mokapu and more particularly described in said aforementioned deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313-314.

To Have and To Hold the same with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining, unto the said Lessee, his executors, administrators and assigns for and during the term of Twenty-five years from the First day of June, A. D. 1910. [221]

Yielding and paying therefor rent as follows:

For the first year the rental shall be free:

For the next ensuing four years the rent shall be at the rate of Three Hundred (\$300.00) Dollars per year, payable semi-annually in advance.

For the next ensuing five years the rent shall be at the rate of Four Hundred (\$400.00) Dollars per year, payable semi-annually in advance.

For the remaining fifteen years the rent shall be at the rate of Five Hundred (\$500.00) Dollars per



year, payable semi-annually in advance.

And the said lessor hereby covenants with the said lessee that he, paying said rent as aforesaid, shall have peaceable and quiet possession of said land during said term.

And the said lessee hereby covenants with the said lessor that he will pay said rent in manner aforesaid, together with all taxes or assessments which may be assessed against said land.

In Witness Whereof, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals the day and year first above written.

JNO. D. HOLT,  
Trustee.

A. V. GEAR.

**[Consent and Consummation of Lease by Robert  
Wyllie Davis.]**

KNOW ALL MEN BY THESE PRESENTS, that I, Robert Wyllie Davis, of Mokapu, Koolaupoko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future [222] under the terms of the aforementioned Deed of Trust.

ROBERT WYLLIE DAVIS.

Territory of Hawaii,  
City and County of Honolulu,—ss.

On this 13th day of July, A. D. 1910, before me



personally appeared John D. Holt, Trustee, and A. V. Gear, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

WILLIAM SAVIDGE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

Territory of Hawaii,  
City and County of Honolulu,—ss.

On this 4th day of August, 1910, before me personally appeared Robert Wyllie Davis, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

WILLIAM SAVIDGE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

**[Assignment of Lease by A. V. Gear to C. A.  
Peterson, October 12, 1910.]**

Stamped \$2.

I, A. V. Gear, of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee named in the foregoing lease, in consideration of One Dollar and of the covenants hereinafter contained, do hereby assign, transfer and set over to C. A. Peterson of Honolulu, the foregoing lease, the premises thereby demised, and all right, title and interest in and under the same. And I, the said assignee, in consideration of the foregoing assignment, hereby covenant with the said assignor that I will pay the

rent which may hereafter become [223] due according to the terms of said lease, and perform all of the covenants and stipulations in said lease contained which are to be performed by the lessee.

In Witness Whereof the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals this 12th day of October, A. D. 1910.

A. V. GEAR.

CHAS. A. PETERSON.

The date in the last line of the foregoing instrument was changed to "12th day of Oct." prior to acknowledgment hereof.

WILLIAM SAVIDGE.

**[Assignment of Lease by C. A. Peterson to Addie B. Gear, October 12, 1910.]**

Stamped \$2.

I, C. A. Peterson of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee by assignment of the foregoing lease, in consideration of One Dollar and of the covenants hereinafter contained do hereby assign, transfer and set over to Addie B. Gear of said Honolulu, the foregoing lease, the premises thereby demised, and all the right, title and interest which I have in and under the same. And I, the said assignee, in consideration of the foregoing assignment, hereby covenant with the said assignor that I will pay the rent which may hereafter become due according to the terms of said lease, and perform all of the covenants which are to be performed by the lessee.

In Witness Whereof, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals this 12th day of Oct., A. D. 1910.

CHAS. A. PETERSON.

ADDIE B. GEAR. [224]

The date in the last line of the foregoing instrument was changed to "12th day of Oct." prior to acknowledgment hereof.

WILLIAM SAVIDGE.

Territory of Hawaii,

City and County of Honolulu,—ss.

On this 14th day of October, A. D. 1910, before me personally appeared A. V. Gear, Chas. A. Peterson and Addie B. Gear, to me known to be the persons described in and who executed the two foregoing instruments and acknowledged that they executed the same as their free act and deed.

WILLIAM SAVIDGE,

Notary Public, First Judicial Circuit, Territory of Hawaii.

**[Assignment of Lease by Addie B. Gear to Fred Harrison, October 21, 1910.]**

Stamped \$2.

I, Addie B. Gear of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee by assignment of the foregoing lease, in consideration of One Dollar to me in hand paid, do hereby assign, transfer and set over to Fred Harrison of said Honolulu, the foregoing lease, the premises thereby demised, and all of the right, title and interest which I have

in and under the same, which is an individual half interest.

In Witness Whereof, I have hereunto set my hand and seal this 21st day of October, A. D. 1910.

ADDIE B. GEAR.

City and County of Honolulu,  
Territory of Hawaii,—ss.

On this 15th day of November, A. D. 1910, before me personally appeared Addie B. Gear, to me known to be the person described in and executed the foregoing instrument, and acknowledged that she executed the same as her free act and [225] deed.

ANTONE MANUEL,

Notary Public, First Circuit, Territory of Hawaii.

Entered of record this 6th day of May, A. D. 1911, at 10:53 o'clock A. M., and compared.

CHAS. H. MERRIAM,

Registrar of Conveyances. [226]

[**Exhibit "B" to Complaint—Agreement November 16, 1910, Between A. V. Gear and Fred Harrison.**]

THIS INDENTURE, made this 16th day of November, A. D. 1910, by and between A. V. Gear, of Honolulu, City and County of Honolulu, Territory of Hawaii, of the first part, and Fred Harrison, of Honolulu aforesaid, party of the second part,

WITNESSETH:

THAT WHEREAS, said Fred Harrison, on the 24th day of October, A. D. 1910, did endorse those two certain promissory notes executed by A. V.



Gear on said 24th day of October, A. D. 1910, one in the sum of Seventeen Hundred and Sixty-seven Dollars and Thirty-five Cents (\$1,767.35), and payable six months from date thereof, and one in the sum of Seventeen Hundred and Sixty-seven Dollars (\$1,767.00), payable in twelve months from the date thereof, both payable to the order of John K. Sumner and both bearing interest at the rate of eight per cent per annum;

AND WHEREAS, in order to partly secure said Fred Harrison said A. V. Gear is desirous and willing to convey to said Fred Harrison certain property, crops, machinery and utensils now being and situated on the land of "Mokapu" as described in that certain Indenture of Lease made by and between John D. Holt, Trustee, as Lessor, and A. V. Gear as Lessee, dated June 1st, A. D. 1910;

NOW THIS INDENTURE WITNESSETH:

THAT said A. V. Gear, in consideration of the premises and the sum of One Dollar to him paid, the receipt whereof is hereby acknowledged, doth hereby assign, transfer, set over and convey unto said Fred Harrison all the right, title and interest which said A. V. Gear may have in and to the land of "Mokapu" as described in that certain Indenture of Lease made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1st, A. D. 1910, together with all growing [227] crops, harvested crops, machinery, tools, buildings, livestock of all kinds and description, plows, harnesses, boats and all personal property of whatsoever kind and nature.



TO HAVE AND TO HOLD unto the said Fred Harrison, his heirs, administrators and assigns, to his and their own behoof forever.

PROVIDED ALWAYS that if said A. V. Gear shall pay to said John K. Sumner those two certain promissory notes executed by A. V. Gear on the 24th day of October, A. D. 1910, one in the sum of \$1,767.35, and payable six months after date thereof, and one in the sum of \$1,767.00, and payable in twelve months from the date thereof, both payable to the order of said John K. Sumner, and shall further reimburse said Fred Harrison, before the 31st day of December, A. D. 1911, for all sums of money paid out on account of or by reason of said endorsements, and shall observe and perform all of the covenants herein contained and on the part of said A. V. Gear to be performed, then these presents shall be void. But upon failure of said A. V. Gear to reimburse said Fred Harrison on or before the 31st day of December, A. D. 1911, for all moneys paid out by said Fred Harrison by reason of said endorsements, or upon the breach by A. V. Gear of any condition herein contained, then said Fred Harrison is hereby expressly authorized and empowered to take possession of said land of Mokapu and all growing crops, harvested crops, machinery, tools, buildings, livestock of all kinds and description, plows, harnesses, boats and all personal property of whatsoever kind and nature, and may retain the same, or sell the same at Public Auction, either as a whole or in par-

cels, at public auction at such time and place as to said Fred Harrison may seem best, and in his own name or as the attorney in fact of said A. V. Gear [228] hereby irrevocably constituted and appointed, may execute, acknowledge and deliver all necessary bills of sale and other instruments, give good and valid receipts for the purchase money and do and perform such other acts as he may deem necessary fully to convey the same premises unto the purchaser or purchasers thereof, and otherwise to carry into effect this power of sale.

Said Fred Harrison to apply the proceeds of sale first to the costs and expenses of sale and foreclosure, together with a counsel's fee, second to the costs and expenses of seizure, possession and removal before sale, if made or taken, third, to the payment of all moneys which shall then be owing to said Fred Harrison on any and every account, whether the same shall or shall not be then due, and the remainder, if any, pay over to said A. V. Gear, his administrators or assigns.

And said A. V. Gear hereby covenants and agrees with said Fred Harrison, his administrators and assigns, as follows:

1. That he will pay to said John K. Sumner the notes herein referred to when due, and will pay to said Fred Harrison on or before the 31st day of December, A. D. 1911, all sums of money paid out by him on account of or for said endorsements.

2. That he will diligently and in a proper manner care for and harvest all crops, animals and all

other property intended to be conveyed by this instrument, and will not request of said Fred Harrison any compensation or salary for so doing.

3. That he will monthly render to said Fred Harrison a statement of all receipts and expenditures on account of said premises and property intended to be conveyed by this instrument. [229]

4. That in the event of said Fred Harrison becoming dissatisfied with the manner in which said A. V. Gear is conducting or managing the business of said land of Mokapu, that he, said A. V. Gear, will pass over to said Fred Harrison the control of said business and all property intended to be conveyed by this instrument, with full power in said Fred Harrison to carry on said business until such time as said promissory notes, herein referred to, are paid, and said Fred Harrison is fully reimbursed for all amounts paid out on account of said endorsements, and for the conduct of said business.

IN WITNESS WHEREOF, said A. V. Gear has hereunto set his hand and seal the day and year first above written.

(Signed) A. V. GEAR.

City and County of Honolulu,  
Territory of Hawaii,—ss.

On this 16th day of November, A. D. 1910, before me personally appeared A. V. Gear, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he exe-

cuted the same as his free act and deed.

(Signed) **ANTONE MANUEL**,  
Notary Public, First Circuit, Territory of Hawaii.  
[230]

**[Exhibit "C" to Complaint—Agreement Between  
A. V. Gear and Addie B. Gear, et al., June 9,  
1911.]**

THIS AGREEMENT made and entered into this ninth day of June, A. D. 1911, by and between A. V. Gear, of Honolulu, and ADDIE B. GEAR, his wife, parties hereto of the first part, and hereinafter called the parties of the first part, and FRED HARRISON, of the same place, party hereto of the second part:

WHEREAS, there has been planted upon the land known as and called "Mokapu," Island of Oahu (as described in deed recorded in Liber 136, page 313 of the Registry of Conveyances), about thirty-five (35) acres of cotton, and which said crop is now growing upon said thirty-five (35) acres, which said thirty-five (35) acres is held under lease by Fred Harrison by virtue of several mesne assignments; and WHEREAS the said A. V. GEAR and ADDIE B. GEAR, his wife, are the owners of said crops; and WHEREAS, the said FRED HARRISON has advanced to the said A. V. GEAR the sum of Three Hundred Dollars (\$300.00) in and about the cultivation of the said cotton crop so growing as aforesaid, and has also paid the sum of Thirteen Hundred Eighty-eighty and 10/100 (\$1,388.10) Dollars in addition thereto, which said money is now due and



owing from the said A. V. Gear to the said FRED HARRISON; and WHEREAS the said FRED HARRISON is about to advance the further sum of Two Hundred (\$200.00) Dollars to pay interest upon a certain promissory note which is now due and unpaid and which said note was made and executed by Robert Wyllie Davis in favor of John K. Sumner for a balance due of Twenty-three Hundred Four and 48/100 (\$2,304.48) Dollars; and WHEREAS, the said FRED HARRISON has further obligated himself to pay for and on behalf of said A. V. GEAR to John K. Sumner the sum [231] of Seventeen Hundred Sixty-seven (\$1,767.00) Dollars and interest thereon at the rate of eight (8%) per cent per annum; and WHEREAS the said A. V. GEAR and ADDIE B. GEAR, his wife, and the said FRED HARRISON are defendants in the suit in equity which is now pending in the Circuit Court of the First Judicial Circuit between John K. Sumner, Plaintiff, and Robert Wyllie Davis, Mark K. Davis, his wife, John D. Holt, Jr., A. V. Gear and Addie B. Gear, his wife, and Fred Harrison Respondents (Equity 1768), for the foreclosure of a mortgage deed of said lands given to secure the payment of the said note; and WHEREAS it is necessary in order to preserve the rights of the parties to this agreement that said interest and costs shall be forthwith paid; and WHEREAS the said FRED HARRISON is about to advance, and does hereby promise and agree to advance, such further sums of money in conjunction with Jordan & Company as will be



necessary to take off the said cotton crops now growing upon said land as hereinbefore set out, and such sum of money as may be absolutely necessary to pick said cotton, prepare it for baling, and to bale and deliver it to said Jordan & Company, or to such other firm or person as the said FRED HARRISON may conclude:

NOW THEREFORE, the said A. V. GEAR and ADDIE B. GEAR, his wife, do hereby absolutely sell, assign, transfer and create a first lien in and upon said crops of cotton and the said cotton when the same shall be baled to the said FRED HARRISON, his executors, administrators and assigns, and the said FRED HARRISON shall have full power to collect the money, the proceeds of the sale of the said cotton, or any part thereof, from time to time when the same shall be delivered, and he, the said FRED HARRISON, shall have [232] absolute control of the funds and proceeds arising from the sale of the said cotton when delivered, and shall have full control of the crops and the cotton from this time forward.

AND IT IS HEREBY FURTHER AGREED that from the proceeds of the sale of the said cotton, the said FRED HARRISON shall retain the said sum of Thirty-eight Hundred (\$3,800.00) Dollars, and interest, being money advanced for the cultivation of said cotton and preparing the same for market, together with the other moneys already advanced as above set forth, and also all other sums to be advanced for and on account of the said A. V. GEAR and ADDIE B. GEAR, his wife.

IT IS HEREBY EXPRESSLY UNDERSTOOD AND AGREED, and it is the intent and meaning of this agreement, that the said FRED HARRISON shall have absolute control over the said crop of cotton, the preparing of the same for market, the delivery thereof and the proceeds therefrom, and no person or persons shall have any power or authority to interfere with the said FRED HARRISON in the cultivation, preparing for market, delivery of said cotton and collecting the proceeds from the sale thereof.

And the said A. V. GEAR does hereby further promise and agree that he will render all possible assistance to the said FRED HARRISON in taking charge of the cultivation of the said cotton, in preparing the same for market, and, under the direction of the said FRED HARRISON, said A. V. GEAR does hereby covenant, promise and agree to render such assistance at all times when requested by the said FRED HARRISON so to do.

It is hereby further agreed that from and out of any sum of money in excess of the said sum of Thirty-eight Hundred (\$3,800.00) Dollars, arising from the proceeds of the [233] sale of the said cotton and any future advances to be made by the said FRED HARRISON, the surplus, if any, after deducting said sum of Thirty-eight Hundred (\$3,800.00) Dollars and interest, and all other advances, shall be paid to the said ADDIE B. GEAR upon her personal receipt therefor, and which said FRED HARRISON agrees to pay to the said

ADDIE B. GEAR personally upon her personal receipt therefor.

It is hereby further agreed that this agreement shall not in any manner vary or alter the terms of that certain agreement made by and between ADDIE B. GEAR and FRED HARRISON, dated October 24, 1910, and that certain agreement made by and between A. V. GEAR and FRED HARRISON, dated November 16, 1910, concerning the said land of Mokapu and the crops to be raised thereon.

IN WITNESS WHEREOF, the said parties of the first part and the said party of the second part have hereunto and to another instrument of like tenor and date set their hands and seals the day and year first above written.

(Signed) A. V. GEAR. (Seal)

(Signed) ADDIE B. GEAR (Seal)

(Signed) FRED HARRISON. (Seal)

Territory of Hawaii,

City and County of Honolulu,—ss.

On this 10th day of June, A. D. 1911, before me personally appeared A. V. Gear and Addie B. Gear, his wife, and Fred Harrison, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

(Signed) CHARLES F. PETERSON,

Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsed]: Filed Jan. 20, 1912, 10 o'clock A. M.  
J. A. Dominis, Clerk. [234]

*In the Circuit Court of the First Circuit, Territory of  
Hawaii.*

AT CHAMBERS.

FRED HARRISON,

Plaintiff,

vs.

A. V. GEAR and ADDIE B. GEAR, His Wife,  
Defendants.

**Chambers Summons.**

(Stamped \$2.)

The Territory of Hawaii, to the High Sheriff of  
the Territory of Hawaii, or his Deputy; the  
Sheriff of the City and County of Honolulu, or  
his Deputy:

YOU ARE COMMANDED to summon A. G. Gear  
and Addie B. Gear his wife, to appear ten days after  
service hereof, if they reside in the City and County  
of Honolulu otherwise twenty days after service, be-  
fore such Judge of the Circuit Court of the First  
Circuit as shall be sitting at Chambers in the Court  
Room of said Judge, in the Judiciary Building, in  
Honolulu, to answer the annexed Bill of Complaint  
of Fred Harrison.

AND YOU ARE FURTHER COMMANDED, by  
order of the Honorable Presiding Judge of the Cir-  
cuit Court of the First Circuit. And have you then  
there this Writ with full return of your proceedings  
thereon.



WITNESS the Honorable the presiding Judge of the Circuit Court of the First Circuit, at Honolulu, aforesaid this 20th day of January, 1912.

[Seal]

J. A. DOMINIS,

Clerk. [235]

Territory of Hawaii,

City and County of Honolulu,—ss.

I, William Henry, High Sheriff of the Territory of Hawaii do hereby certify and make return that I served the within Summons, Bill of Complaint and Exhibits “A,” “B” and “C” as follows:

On A. V. Gear, therein named as defendant, at Honolulu, city and county of Honolulu, Territory of Hawaii, this 22d day of January, A. D. 1912, by delivering to him a certified copy hereof of the Bill of Complaint and Exhibits “A,” “B” and “C” annexed hereto and at the same time showing him the original as herein directed. Dated Honolulu, city and county of Honolulu, Territory of Hawaii this 22d day of January, A. D. 1912.

WM. HENRY,

High Sheriff, Territory of Hawaii.

Territory of Hawaii,

City and County of Honolulu,—ss.

I, Patrick Gleason, Deputy High Sheriff of the Territory of Hawaii do hereby certify and make re-

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Section 1769 Revised Laws. The time within which an act is to be done \* \* \* shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.



turn that I served the within Summons, Bill of Complaint and Exhibits "A," "B" and "C" as follows:

On Addie B. Gear, therein named as defendant, at Honolulu, city and county of Honolulu, Territory of Hawaii this 22d day of January, A. D. 1912, by delivering to her a certified copy hereof and of the Bill of Complaint and Exhibits "A," "B" and "C" annexed hereto and at the same time showing her the original as herein directed.

Dated Honolulu, City and County of Honolulu, Territory of Hawaii this 22d day of January, A. D. 1912.

PATRICK GLEASON,  
Deputy High Sheriff, Territory of Hawaii.

[Endorsed]: E. No. 1814. Reg. 2, Pg. 63. Circuit Court, First Circuit. Fred Harrison vs. A. V. Gear and Addie B. Gear, His Wife. Chamber Summons. Issued at 10:05 o'clock A. M., Jan. 20th, 1912. J. A. Dominis, Clerk. Returned at 10:35 o'clock A. M., Jan. 23d, 1912. J. A. Dominis, Clerk.

[In pencil:] 28/181 Pau.

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*In the Circuit Court of the First Circuit, Territory  
of Hawaii.*

AT CHAMBERS—IN EQUITY.  
FRED HARRISON

vs.

A. V. GEAR and ADDIE B. GEAR.

**Answer of A. V. Gear, Defendant.**

BILL TO FORECLOSE LIEN, ETC. EQ. #1814.

This defendant, now and at all times hereafter, sav-

ing and reserving unto himself all benefit and advantage of exception which may be had or taken to the manifold errors, uncertainties, and other imperfections in the plaintiff's said bill of complaint for answer thereto, or unto so much and such parts as this defendant is advised is or are material to be answered unto, this defendant for answering says:

1. He admits the truth of the allegations contained in paragraphs I, II, III, in so far as it applies to one-half of said premises, IV, V, VI, and X of said complaint.

2. He denies the truth of the allegations as contained in paragraphs VII, VIII, IX and XI of said complaint.

3. In further answering the matters contained in paragraphs VII he alleges the truth to be that the said advances made by plaintiff on account of said premises and property and the business and transactions referred to were made solely to and on behalf of this defendant and not on behalf of the defendant Addie B. Gear, and that said defendant Addie B. Gear is in no way liable, either personally or otherwise, for any of such payments and advances.

4. In further answering the matters contained in paragraph VIII he alleges the truth to be that plaintiff has not paid [236] nor made any advances to or on behalf of the defendant Addie B. Gear nor is she in any way indebted for the same, but that all payments and advances made under said documents and agreements were made for and on behalf of this defendant only.

5. In further answering the matters contained in

paragraph XI of said complaint he alleges the truth to be that by reason of the failure of said plaintiff to be reimbursed the sums so advanced by him in connection with said property and business and the transactions referred to in said documents and agreements, this defendant is in default, and this defendant admits that by reason of the premises said plaintiff is entitled to foreclose his lien created by said documents and agreements and is entitled to sell said premises as provided in said agreements, and this defendant is willing and hereby consents that a decree may be entered herein directing that said lien be foreclosed and that said premises be sold as provided in said agreements and that he as well as defendant Addie B. Gear be forever barred and foreclosed from all right title and interest claim demand or equity of redemption in and to said property which he or she has acquired and transferred to plaintiff under said leases and agreements.

Wherefore this defendant submits himself to such orders and decrees in the premises as shall be meet and proper.

Dated Honolulu, January 29, 1912.

A. V. GEAR,

C. F. PETERSON,

Attorney for Defendant.

Oath waived.

WILLIAM T. RAWLINS,

Attorney for Plaintiff.

Copy hereof received.

WILLIAM T. RAWLINS,

Atty. for Plaintiff.

[Endorsed]: Eq. No. 1814. Reg. 2, pg. 63. Circuit Court, First Circuit. Fred Harrison vs. A. V. Gear and Addie B. Gear, His Wife. Answer of A. V. Gear. Filed Feb. 2, 1912, 1:25 P. M. J. A. Dominis, Clerk. [237]

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*In the Circuit Court of the First Circuit, Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.  
FRED HARRISON

vs.

A. V. GEAR and ADDIE B. GEAR.

**Answer of Addie B. Gear, Defendant.**

BILL TO FORECLOSE LIEN, ETC., EQ. No. 1814.

This defendant, now and at all times hereafter, saving and reserving unto herself all benefit and advantage of exception which may be had or taken to the manifold errors, uncertainties, and other imperfections in the plaintiff's said bill of complaint for answer thereto, or unto so much and such parts as this defendant is advised is or are material to be answered unto, this defendant for answering says:

1. She admits the truth of the allegations contained in paragraphs I, II, III in so far as it applies to one-half of said premises, IV, V, VI and X of said complaint.

2. She denies the truth of the allegations contained in paragraphs VII, VIII, IX and XI of said complaint.

3. In further answering the matters contained in



paragraph VII she alleges the truth to be that whatever advances were made by plaintiff on account of said premises and property and the business referred to were made solely to and on behalf of A. V. Gear, defendant, and not on behalf of this defendant, and that this defendant is in no way liable, either personally or otherwise, for any of such payments and advances.

4. In further answering the matters contained in paragraph VIII she alleges the truth to be that plaintiff has not paid nor made any advances to or on behalf of this defendant nor is this defendant in any way indebted to plaintiff for the same.

5. In further answering the matters contained in paragraph [238] XI of said complaint she alleges the truth to be that by reason of the failure of said plaintiff to be reimbursed the sums so advanced by him in connection with said property and business under the documents and agreements referred to this defendant is in default in so far as she has any right to claim said premises, and this defendant admits that by reason of the premises said plaintiff is entitled to foreclose his lien created by said agreements and leases and is entitled to sell said premises as provided in said agreements, and this defendant is willing and hereby consents that a decree may be entered herein directing that said lien be foreclosed and that said premises be sold and that she be forever barred and foreclosed from all right, title and interest, claim, demand or equity of redemption in and to said property which she has acquired and transferred to plaintiff under said lease and agreements, but that said



decree be entered without costs being taxed against this defendant.

Wherefore this defendant prays she may be hence dismissed with her costs herein.

Dated Honolulu, January 29, 1912.

ADDIE B. GEAR.

C. F. PETERSON,

Attorney for Defendant.

Oath waived.

WILLIAM T. RAWLINS,

Attorney for Plaintiff.

Copy hereof received.

WILLIAM T. RAWLINS,

Atty. for Plaintiff.

[Endorsed]: Eq. No. 1814. Reg. 2, pg. 63. Circuit Court, First Circuit. Fred Harrison vs. A. V. Gear and Addie B. Gear, His Wife. Answer of Addie B. Gear. Filed Feb. 2, 1912, 1:25 P. M. J. A. Dominis, Clerk. [239]

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*In the Circuit Court of the First Circuit, Territory  
of Hawaii.*

AT CHAMBERS—IN EQUITY.

FRED HARRISON

vs.

A. V. GEAR and ADDIE B. GEAR, His Wife.

**Special Appearance and Motion to Quash Summons  
and Service Thereof.**

BILL TO FORECLOSE LIEN.

Now comes C. F. Peterson, and appearing specially

on behalf of A. V. Gear and Addie B. Gear, the defendants above named, and not submitting said defendants to the jurisdiction of this court, but appearing specially for the purpose of raising the question of such jurisdiction and of this motion, and not otherwise, moves this Honorable Court that the summons and service thereof in this cause upon the said defendants be quashed and set aside and declared void on the ground that this Honorable Court has no jurisdiction in or over the above-entitled cause nor of the defendants, for the reason that the process issued in this cause has not been issued as required by law, and more particularly as required by Section 1839 of the Revised Laws of Hawaii.

This motion is based upon all of the records and papers in said cause and upon the testimony to be adduced at the hearing of this motion.

Dated Honolulu, February 1, 1912.

A. V. GEAR and  
ADDIE B. GEAR,  
By C. F. PETERSON,  
Their Attorney. [240]

### **Notice of Motion.**

To Fred Harrison, Esq., and W. T. Rawlins, Esq.,  
His Attorney:

Dear Sirs:

Please take notice that the foregoing motion will be presented to the Presiding Judge of said court at his chambers in the courthouse in Honolulu on Monday, February 5, 1912, at 9:30 o'clock A. M., or as

soon thereafter as counsel may be heard.

C. F. PETERSON,

Attorney for Defendants.

[Endorsed]: E. No. 1814. Reg. 2, pg. 63. Circuit Court, First Circuit. In Equity. Fred Harrison vs. A. V. Gear, etc. Bill to Foreclose Lien. Motion to Quash. Filed at 4:35 P. M., Feby. 1, 1912. Henry Smith, Clerk. C. F. Peterson, Attorney for Defendants. [241]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

FRED HARRISON,

Plaintiff,

VS

A. V. GEAR and ADDIE B. GEAR, His Wife,  
Defendants.

**Motion for Decree of Foreclosure.**

**BILL TO FORECLOSE MORTGAGE AND LIEN.**

Now comes Fred Harrison, plaintiff herein, and moves this Honorable Court that it make and enter its decree in favor of said Fred Harrison and against A. V. Gear and Addie B. Gear, his wife, defendants in said cause, substantially in the manner and form as set forth in the form of Decree of Foreclosure hereto annexed and made a part of this motion.

Said motion is made upon the ground that under the pleadings in said cause all and singular the material allegations set forth and contained in the plain-

tiff's Bill of Complaint on file in said cause stand admitted to be true by said defendants.

This motion is based upon the pleadings, papers, records and files in said cause, reference whereto is hereby made and the same made part hereof.

Honolulu, February 5th, 1912.

FRED HARRISON,  
Plaintiff,  
By WILLIAM T. RAWLINS,  
His Attorney. [242]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

FRED HARRISON,  
Plaintiff,  
vs

A. V. GEAR and ADDIE B. GEAR, His Wife,  
Defendants.

**Decree of Foreclosure.**

Upon the motion of Fred Harrison by his attorney, William T. Rawlins, for the entry of a Decree of Foreclosure in the above-entitled cause in favor of said Fred Harrison: It appearing to this Court that the above-named defendants A. V. Gear and Addie B. Gear have filed their several answers to the Bill of Complaint in said cause wherein and whereby said defendants admit the allegations and matters as in said several answers contained. And it also appearing to this Court upon said complaint and said answers thereto that all and singular the allegations



in said Bill of Complaint set forth which are admitted by said answers are true and that said Fred Harrison plaintiff is justly entitled to the relief by him in said Bill of Complaint prayed as admitted by said answers.

I.

That there is now due and owing from said defendant A. V. Gear to said Fred Harrison upon the mortgage and agreements sued upon in this action the sum of Three Thousand Seven [243] Hundred Forty-eight and 7/100 (\$3,748.07) Dollars, together with interest thereon at the rate of eight (8%) per cent per annum from the 20th day of January, 1912.

II.

That said Addie B. Gear by her written answer to said Bill of Complaint consents that a decree may be entered in this cause that the lien of said Fred Harrison created by the mortgage leases and agreements sued upon in this cause be foreclosed and that said premises be sold and that she be forever barred and foreclosed from all right, title and interest, claim or demand or equity of redemption in and to said property which she has acquired and transferred to said Fred Harrison under said mortgage, leases and agreements.

III.

That each and all the terms and conditions of said mortgage and agreements have been broken by said defendant A. V. Gear, defendant herein, and that said Fred Harrison, plaintiff herein, is entitled to have said mortgage and agreements foreclosed and the property hereinafter set forth and described sold

in the manner prescribed by law, and the proceeds arising from said sale applied to and upon the payment of said sum of money so due as aforesaid:

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that all and singular the property set forth in said mortgage and agreements and hereafter more particularly described be sold at public auction at the front door of the Circuit Court Building, Honolulu, city and county of Honolulu, Territory of Hawaii, upon the terms hereinafter set forth:

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that [244] Job Batchelor, Esq., be and he is hereby appointed a Commissioner to sell the property hereinafter set forth, that before entering upon his duties as such Commissioner he take the oath and give a bond in the sum of Five Hundred (\$500) Dollars for the faithful discharge of his duties as such Commissioner.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that whatever sum or sums of money may be derived by said Commissioner as aforesaid from the sale of said property hereinafter described and set forth, shall be by said Commissioner held subject to the order of this court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the mortgaged premises hereinafter mentioned or described or so much thereof as shall be necessary to raise the amount due to the complainant herein and the costs of this suit and expenses of sale be sold at public auction by Job Batchelor, Esq., Commissioner herein, upon notice of the same

being given by said Commissioner by publication in the "Hawaiian Star," a newspaper of general circulation printed and published in Honolulu, city and county of Honolulu, Territory of Hawaii aforesaid, for at least three times a week for two weeks from the date of the first publication thereof, and that the purchaser or purchasers at said sale pay to said Commissioner upon the fall of the hammer ten (10%) per cent of the price bid, the balance to be paid upon the delivery of bill of sale and conveyances by the said Commissioner.

That said Commissioner may adjourn said sale from time to time upon giving such notice as to him may seem reasonable of such adjournment, and may make said sale at the time and place to which the same shall be adjourned.

That said Commissioner upon the sale of the property herein set forth and described shall make his report to this Court with all convenient speed, and upon the report being made [245] to the Court of his proceedings herein, and upon the confirmation thereof, he is authorized and empowered to execute a bill of sale to the purchaser or purchasers thereof free and clear of all incumbrances or lien thereon.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that said Job Batchelor, Commissioner herein, out of the proceeds of said sale, retain his fees as such Commissioner and the costs and expenses of said sale, and pay to Henry Smith, Esq., Clerk of the Circuit Court, any sum found to be due as costs of court and pay to plaintiff's counsel the sum of One Hundred Eighty-five Dollars as counsel

fee, and pay over to said Fred Harrison the sum of Three Thousand Seven Hundred Forty-eight and 7/100 (\$3,748.07) Dollars, together with interest thereon at the rate of eight (8%) per cent per annum from the 20th day of January, A. D. 1912, and any overplus after payment of said Three Thousand Seven Hundred Forty-eight and 7/100 (\$3,748.07) Dollars, together with interest thereon, shall be held by said Job Batchelor, Commissioner, subject to the order of this court:

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants A. V. Gear and Addie B. Gear, and all persons claiming or to claim from and under them and each of them, and all persons having liens or claims or a lien or claim subsequent to the said mortgages and agreements, by judgment or decree upon the property hereinafter described, and their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives and all persons claiming to have acquired any share or interest in said property be and they are hereby forever barred and foreclosed of and from all claim, right, title, interest, lien, incumbrance and equity of redemption in and to the property set forth and described in said mortgages and agreements and hereinafter set forth and [246] described and every part and parcel thereof from and after the date hereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff herein, Fred Harrison, may become a purchaser at said sale of said



Commissioner, and that the purchaser or purchasers of said property set forth in said mortgage and agreements be let into and given immediate possession thereof, and that all of the parties to this action who may be in possession of said lands and property or any part thereof, and any person who since the commencement of this action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers on production of the Commissioner's deed for said premises and property or any part thereof.

The premises and property described to be sold under this decree are:

Undivided half interest of Addie B. Gear and A. V. Gear in and to that certain Indenture of Lease, made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1st, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton; one mule, one boat, chickens, ducks, turkeys, cotton gin, press and baler, tools, farming implements and cotton seed now on said premises.

AND IT IS FURTHER ORDERED AND DECREED that plaintiff recover and have from defendant A. V. Gear his costs in this cause expended.

DONE in open Court this 6th day of February,  
A. D. 1912.

HENRY E. COOPER,  
First Judge of the Circuit Court of the First Judicial  
Circuit, Territory of Hawaii.

O. K.—C. F. PETERSON,  
Attorney for Defendants. [247]

[Endorsed]: E. No. 1814. Reg. 2, pg. 63. Circuit Court, First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity. Fred Harrison, Plaintiff, vs. A. V. Gear and Addie B. Gear, His Wife, Defendants. Motion for Decree and Decree of Foreclosure. Filed Feb. 5, 1912, 3:40 P. M. J. A. Dominis, Clerk. [248]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

IN EQUITY—AT CHAMBERS.

No. 1814.

FRED HARRISON,

vs.

A. V. GEAR and ADDIE GEAR, His Wife.

**Return and Account of Sale by the Commissioners.**  
**BILL TO FORECLOSE MORTGAGE AND**  
**LIEN.**

To the Honorable HENRY E. COOPER, First  
Judge of the Above-entitled Court, Presiding at  
Chambers:

The undersigned Job Batchelor, of Honolulu, city

and county of Honolulu, Territory of Hawaii, a Commissioner duly appointed by the Decree of Foreclosure of this Honorable Court, duly given and made in the above-entitled cause on the 6th day of February, A. D. 1912, respectfully makes and files return and account of sale made by him pursuant to said Decree of Foreclosure and Lien, directing him to sell at public auction the property in said Decree of Foreclosure and Lien and hereafter more particularly described, and report said sale to this Court, to wit:

That the undersigned, as such Commissioner, and pursuant to said Decree of Foreclosure and Lien, caused public notice of said sale to be given by publication in the "Hawaiian Star," a newspaper of general circulation printed, published and circulated in Honolulu, city and county of Honolulu, Territory of Hawaii, for at least three (3) times a week for two (2) weeks, to wit: On February 8, 12, 15, 17, 19, 21 and 23, 1912, which [249] said notice did specify a day and time and place on which and at which said property would be sold and said sale would be had and on which said notice the property advertised to be sold was described with common certainty, to wit, a true as well as a popular description of said property, as hereinafter more particularly described; all of which will be more fully and at large appear by and from the "Affidavit of Publication" hereunto annexed marked Commissioner's Exhibit "A" and made a part hereof.

That the undersigned, as such Commissioner, caused to be posted up in prominent places in said

Honolulu and vicinity and on the property advertised to be sold notices of the time and place of sale; in which said notices the property advertised to be sold was described with common certainty, to wit, a true as well as a popular description of said property, as hereinafter more particularly described, as will more fully and at large appear by and from a copy of said notices (or posters) hereunto annexed, marked Commissioner's Exhibit "2" and made a part hereof.

That on Saturday, the 24th day of February, A. D. 1912, at 12 o'clock noon of said day, at the front entrance of the Circuit Court in the Y. M. C. A. Building on Hotel Street, Honolulu, city and county of Honolulu, Territory of Hawaii, the same being the place designated and set forth in said notices so published and posted as aforesaid, the undersigned, as Commissioner, offered to read the Decree of Foreclosure and Lien heretofore entered herein, and also caused to be read the Commissioner's notice of sale.

That the undersigned, as such Commissioner, thereupon offered for sale all that undivided half interest of Addie B. Gear and A. V. Gear in and to that certain Indenture of Lease, made by and between John D. Holt, Trustee, and A. V. Gear, dated [250] June 1st, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton, one mule, one boat, chickens, ducks, turkeys, cotton gin, press



and baler, tools, farming implements and cotton seed now on said premises.

That prior to the crying of the sale, the Commissioner caused to be read the Commissioner's notice of sale and the Decree of Foreclosure and Lien heretofore entered herein.

That the undersigned, as such Commissioner, engaged and employed James F. Morgan, Esq., a duly licensed auctioneer, who cried and announced said sale and assisted the undersigned, as such commissioner, in carrying on and in making and in conducting said sale.

That in pursuance of said Decree of Foreclosure and Lien and the Commissioner's Notice of Sale the said land and premises hereinbefore described were sold as one piece.

That at such sale the undersigned, as such Commissioner, sold to Cecil Brown, Trustee, who became the purchaser of the property so offered for sale and sold as aforesaid for the price and sum of Three Thousand Seven Hundred (\$3,700) Dollars, and the said purchaser was the highest and best bidder, and the sum and amount above specified and set forth was the highest and best bid for the property so offered for sale and sold as aforesaid.

That the undersigned is informed and believes, and so states the facts to be, that the sum bid and the amount realized at said sale is not disproportionate to the value of the property as aforesaid.

That said sale was fairly and honestly conducted.  
[251]

That the following is a full, true and particular

account of said sale, together with the amount realized thereat and the expenses thereto, to wit:

RECEIPTS:

Amount realized from sale of property .....	\$3,700.00
--	------------

EXPENDITURES:

“Hawaiian Star” advertising, etc. ....	38.95	
W. T. Rawlins, attorney’s fee .....	185.00	
J. F. Morgan, auctioneer.....	50.00	
Automobile hire .....	31.00	
Job Batchelor, Commissioner...	75.00	
Court Costs .....	22.00	401.95
		<hr/>
		\$3,298.05

That the Decree of Foreclosure and Lien of this Honorable Court has in all respects been fully complied with.

WHEREFORE, the undersigned, as such Commissioner, respectfully prays the order and decree of this Court that said sale be approved and confirmed, and the undersigned, as such Commissioner, be authorized, empowered and directed to make, execute and deliver to the purchaser at said sale a good and sufficient deed of conveyance of said property so purchased as aforesaid, and that a reasonable sum and amount be fixed and ordered paid to the undersigned for and in compensation for his services as such Commissioner, and that thereupon he be relieved and discharged of and from any and all further liability

or obligation as such Commissioner, and that his bond be cancelled.

Dated, Honolulu, February 27th, 1912.

JOB BATCHELOR,  
Commissioner. [252]

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[Commissioner's Exhibit "A"—Affidavit of Publication.]

(Form for Hearing.)

*In the Circuit Court of the First Circuit, Territory of  
Hawaii.*

AT CHAMBERS.

In the Matter of FRED HARRISON vs. A. V.  
GEAR and ADDIE B. GEAR.

**Affidavit of Publication.**

Territory of Hawaii, City,  
and County of Honolulu,—ss.

Jas. T. Carey, being duly sworn, deposes and says,

~~Manager~~

that he is ~~Foreman~~  
Clerk

paper Assn. Ltd. publishers of the "HAWAIIAN STAR," a newspaper published in the City and County of Honolulu Territory of Hawaii; that the ordered publication in the above-entitled matter of which the annexed is a true and correct printed notice was published seven times in the "Hawaiian Star," aforesaid, commencing on the 7th day of February 1912, and ending on the 23d day of February 1912 (both days inclusive), to wit, on Feb. 8, 12, 15, 17, 19,

21, 23, and that affiant is not a party to or in any way interested in the above entitled matter.

JAS. T. CAREY.

Subscribed and sworn to before me this 24th day of Feb., A. D. 1912.

[Seal]

J. A. DOMINIS,

Clerk Circuit Court of the First Circuit.

COMMISSIONER'S SALE of  
VALUABLE LEASEHOLD, ETC.

Situated at Mokapu, Island of Oahu, Territory of Hawaii.

Pursuant to a Decree of Foreclosure made by the Honorable Henry E. Cooper, First Judge of the Circuit Court of the First Circuit of the Territory of Hawaii, at Chambers, in Equity, on the 6th day of February, A. D. 1912, in a suit in Equity, No. 1814, entitled, "Fred Harrison, plaintiff, vs. A. V. Gear and Addie B. Gear, His Wife, Defendants: Bill to Foreclose Mortgage and Lien," (Equity Division, No. 1814), the undersigned, as Commissioner, duly appointed and constituted as such by said Decree of Foreclosure, will sell, at Public Auction, to the highest and best bidder for cash, subject to confirmation by the Court, on SATURDAY, the 24th DAY OF FEBRUARY, A. D. 1912, at 12 o'clock noon of said day, at the front (mauka) door of the Circuit Court Building, Honolulu, City and County of Honolulu, Territory of Hawaii, the following described premises and property:

Undivided half interest of Addie B. Gear and A. V. Gear in and to that certain Indenture of Lease, made by and between John D. Holt, Trustee, and A. V.



Gear, dated June 1st, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances, of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton; one mule, one boat, chickens, ducks, turkeys, cotton gin, press and baler, tools, farming implements and cotton seed now on said premises.

**TERMS OF SALE:** Cash in United States Gold Coin; ten per cent. (10%) of the purchase price to be paid on the fall of the hammer; balance upon confirmation of sale by the Court and execution and delivery of deed by the Commissioner.

Deed to be at expense of purchaser.

For further particulars apply to Mr. W. T. Rawlins, attorney for plaintiff, at his office, Judd Building, Honolulu, or to the undersigned.

**JOB BATCHELOR,**

Commissioner.

Dated Honolulu, T. H. February 8, 1912.

7ts, Feb. 8, 12, 15, 17, 19, 21, 23, 1912.

[Endorsed]: Equity 1814. Circuit Court, First Circuit. In the Matter of Fred Harrison vs. A. V. Gear & Addie B. Gear. Affidavit of Publication. (As to a Hearing.) Filed at 9:25 o'clock A. M. On Feb. 24, 1912. J. A. Dominis, Clerk. Commissioner's Exhibit "A." Filed February 26th, 1912. Job Batchelor Commissioner. [253]

**[Commissioner's Exhibit No. 2—Notice of Sale.]****COMMISSIONER'S SALE of  
VALUABLE LEASEHOLD, ETC.**

Situate at Mokapu, Island of Oahu, Territory of  
Hawaii.

Pursuant to a Decree of Foreclosure made by the Honorable Henry E. Cooper, First Judge of the Circuit Court of the First Circuit of the Territory of Hawaii, at Chambers, in Equity, on the 6th day of February, A. D. 1912, in a suit in Equity, No. 1814, entitled, "Fred Harrison, plaintiff, vs. A. V. Gear and Addie B. Gear, his wife, defendants: Bill to Foreclose Mortgage and Lien," (Equity Division No. 1814), the undersigned, as Commissioner, duly appointed and constituted as such by said Decree of Foreclosure, will sell, at Public Auction, to the highest and best bidder for cash, subject to confirmation by the Court, on Saturday, the 24th day of February, A. D. 1912, at 12 o'clock noon of said day, at the front (Mauka) door of the Circuit Court Building, Honolulu, City and County of Honolulu, Territory of Hawaii, the following described premises and property:

Undivided half interest of Addie B. Gear and A. V. Gear in and to that certain Indenture of Lease, made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1st, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances, of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton; one mule, one boat, chickens, ducks, turkeys, cotton gin, press and baler, tools, farming implements and cotton seed now on said premises.

**TERMS OF SALE:** Cash in United States Gold Coin; ten per cent (10%) of the purchase price to be paid on the fall of the hammer; balance upon confirmation of sale by the Court and execution and delivery of deed by the Commissioner.

Deed to be at expense of purchaser.

For further particulars apply to Mr. W. T. Rawlins, attorney for plaintiff at his office, Judd Building, Honolulu, or to the undersigned.

**JOB BATCHELOR,**  
Commissioner.

Dated Honolulu, T. H. February 8, 1912.

[Endorsed]: Equity 1814. Fred Harrison vs. A. V. Gear and Addie B. Gear. Commissioner's Exhibit "2." Filed February 26/12. Job Batchelor, Commissioner. [254]

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**[Receipt, February 26, 1912, William T. Rawlins to  
Job Batchelor, etc.]**

Honolulu, February 26th, 1912.

Received from Job Batchelor, Commissioner, One Hundred Eighty-five no/100 Dollars, being attorney's fee allowed by Court in Equity Matter 1814 (Fred Harrison v. A. V. Gear et al.).

**WILLIAM T. RAWLINS.**

\$185. [255]

**[Receipt, February 27, 1912, of Job Batchelor,  
Commissioner.]**

Honolulu, T. H. February 27, 1912.

Received—from Seventy-five 00/100 Dollars, Commissioner's Fee allowed by Court in Equity suit No. 1814, Fred Harrison vs. A. V. Gear et al.

**JOB BATCHELOR,**  
Commissioner.

\$75.00/100. [256]

**[Bill of Hawaiian Star Newspaper Association.]**

No. 2365.

E. No. 2165.

Honolulu, T. H., Feb. 12, 1912—191.

**M**            **JOB BATCHELOR,**

In Account with The Hawaiian Star Newspaper Association, Limited.

Printers and Publishers.    Daily and Semi-weekly.

8. To Commissioner's Sale Fred

Harrison vs. A. V. Gear,

11½" 7ts. .... 37 95

12.    "    25 Slips for same. .... 1 00    38 95

Hawaiian Star Newspaper Assn.

**PAID**

Feb. 29, 1912.

By Jas. T. Carey.

**COMMISSIONER'S SALE OF VALUABLE  
LEASEHOLD, ETC.**

Situate at Mokapu, Island of Oahu, Territory of  
Hawaii.

Pursuant to a Decree of Foreclosure made by the



Honorable Henry E. Cooper, First Judge of the Circuit Court of the First Circuit of the Territory of Hawaii, at Chambers, in Equity, on the 6th day of February, A. D. 1912, in a suit in Equity No. 1814, entitled "Fred Harrison, plaintiff, v. A. V. Gear and Addie B. Gear, his wife, defendants: Bill to Foreclose Mortgage and Lien," (Equity Division No. 1814), the undersigned, as Commissioner, duly appointed and constituted as such by said Decree of Foreclosure, will sell, at Public Auction, to the highest and best bidder for cash, subject to confirmation by the Court, on Saturday, the 24th day of February, A. D. 1912, at 12 o'clock Noon of said day, at the front (Mauka) door of the Circuit Court Building, Honolulu, City and County of Honolulu, Territory of Hawaii, the following described premises and property:

Undivided half interest of Addie B. Gear and A. V. Gear in and to that certain Indenture of Lease, made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1st, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances, of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton; one mule, one boat, chickens, ducks, turkeys, cotton gin, press and baler, tools, farming implements and cotton seed now on said premises.

**TERMS OF SALE:** Cash in United States Gold Coin; ten per cent (10%) of the purchase price to

be paid on the fall of the hammer; balance upon confirmation of sale by the Court and execution and delivery of deed by the Commissioner.

Deed to be at expense of purchaser.

For further particulars apply to Mr. W. T. Rawlins, attorney for plaintiff, at his office, Judd Building, Honolulu, or to the undersigned.

**JOB BATCHELOR,**

Commissioner.

Dated: Honolulu, T. H., February 8, 1912.

7ts. Feb. 8, 12, 15, 17, 19, 21, 23, 1912. [257]

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**[Bill of James F. Morgan, Auctioneer, February 26, 1912.]**

Cable Address "MORGANA."

Honolulu, T. H., Feb. 26, 1912.

W. T. Rawlins, Atty.,

To James F. Morgan, Dr.

Real Estate Broker and Auctioneer.

Stocks and Bonds.

Telephone 1572

857 Kaahumanu Street.

Postoffice Box 594

To auctioneer's services, re sale of Mokapu

leasehold, sold on Feb. 24, 1912, to Cecil

Brown, Trustee, for \$3700.00..... 50.00

(Equity #1814)

Received payment, Feb. 26, 1912.

**JAS. F. MORGAN.**

**E. L. SCHWARZBERGER. [258]**

**[Statement of Costs in Harrison vs. Gear et ux. in  
Circuit Court.]**

	Stamps .....	5.00
	Sums and service.....	5.
	3 Exhibits .....	75
	Service .....	2 50
	Ans. ....	.50
	Mo. to Quash.....	1.25
	Mo. and Decree.....	2.50
	2 Exh. ....	50
Docket 28/181.	Affid.....	50
	Return .....	50
	a/c .....	50
	Confirm .....	1 25
	Bond .....	1 25
		<hr/>
		22.00

Paid in as a deposit

Jan. 20/12.

HENRY SMITH,

Clerk, etc.

Court Costs.

Feb. 29/12.

[Endorsed]: Equity 1814. Rg. 2/63. Circuit Court, First Circuit. Fred Harrison v. A. V. Gear and Addie B. Gear, His Wife. Commissioner's Return of Sale. Filed February 27th, 1912, 1:05 P. M. Job Batchelor, Clerk. [259]

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

IN EQUITY—No. 1814—AT CHAMBERS.

FRED HARRISON,

Plaintiff,

vs.

A. V. GEAR and ADDIE B. GEAR, His Wife,  
Defendants.

**Order Confirming Sale.**

BILL TO FORECLOSE MORTGAGE AND LIEN.

This matter coming on regularly to be heard this 27th day of February, A. D. 1912, and it appearing from proofs adduced to the satisfaction of the Court that notice of this hearing had been duly served upon said A. V. Gear and Addie B. Gear, defendants herein, and on C. F. Peterson, Esq., their attorney;

And it further appearing that heretofore on the 27th day of February, 1912, Job Batchelor, the Commissioner appointed by a decree of this Court, made the 6th day of February, 1912, to sell the mortgaged property involved in this suit, did file and enter herein a certain return and account of sale wherein and whereby he did report the sale on February 24th, 1912, to Cecil Brown, Trustee, of all the property in said decree described as follows:

Undivided half interest of Addie B. Gear and A. V. Gear in and to that certain Indenture of Lease, made by and between John D. Holt, trustee, and A. V. Gear, dated June 1st, A. D. 1910, recorded in Liber



343, pages 347-351, Hawaiian Registry of Conveyances of the land of Mokapu, Island of Oahu, Territory of Hawaii. [260]

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton; one mule, one boat, chickens, ducks, turkeys, cotton gin, press and baler, tools, farming implements and cotton seed now on said premises.

And it appearing to the satisfaction of the Court upon proofs adduced that said sale was legally made and fairly conducted; that the sum bid for the said property sold was not disproportionate to the value of the property sold, and that no exceptions have been filed or objections made to said Commissioner's report of sale, or to the confirmation of said sale, and no good reason appearing why said sale should not be confirmed, and that said decree of foreclosure and sale has in all respects been complied with by said Commissioner; and it further appearing that the amount due to the complainant herein up to the date of said sale, to wit, February 24th, 1912, is the sum of \$3,773.07, and that the net proceeds of said sale after deducting all costs and expenses of sale and advertising, attorneys fees and Commissioner's fee is the sum of \$3,798.05.

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

1. That the return and account of sale by the Commissioner be and the same is in all respects ratified, approved and confirmed.

2. That in accordance with the decree of Febru-

ary 6, 1912, the sale of the property hereinbefore described to Cecil Brown, Trustee, for the sum of Three Thousand Seven Hundred (\$3,700) Dollars be and the same is hereby ratified, approved and confirmed, and the said Commissioner is hereby ordered and directed to make a good and sufficient conveyance thereof to the said Cecil Brown, Trustee.

3. That the said Job Batchelor be and he is allowed the sum of \$75 in full compensation for his services as said Commissioner.

4. That out of the sum of \$3,700, the total receipts from the property so sold, the said Commissioner do pay

(a) To William T. Rawlins the sum of \$185 as an attorney's fee. [261]

(b) To Job Batchelor the sum of \$75 as Commissioner's fee.

(c) The costs and expenses of Court incurred in this foreclosure proceeding by plaintiff amounting to \$22.

(d) The expenses of sale, to wit, \$88.95.

(e) That the Commissioner do pay to Fred Harrison the sum of \$3,298.05, being the balance of the proceeds of said sale now in his hands.

5. That upon the Commissioner making such payments and filing herein proper receipts therefor he be discharged from further duty or responsibility as such Commissioner and his bond filed herein be cancelled.

Dated Honolulu, February 28th, 1912.

HENRY E. COOPER,

First Judge, First Circuit Court, Territory of  
Hawaii.

[Endorsed]: Equity 1814. Rg. 2/63. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In Equity. At Chambers. Fred Harrison, Plaintiff, vs. A. V. Gear and Addie B. Gear, His Wife, Defendants. Order Confirming Sale. Filed February 29th, 1912, 11:45 A. M. Job Batchelor, Clerk. [262]

[Endorsed]: Number 1814, Equity Division Circuit Court, First Circuit. Fred Harrison vs. A. V. Gear and Addie B. Gear, His Wife. 1912. Foreclose Mortgage and Lien. Entered in Docket 28, page 181, Record —, Page —. J. A. Dominis, Clerk. No. 757. Received and filed in the Supreme Court, January 14, 1914, at 8:40 A. M. J. A. Thompson, Clerk. No. 814. Rec'd and filed in the Supreme Court November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [263]

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**Sheriff's Return to Writ of Possession.**

**HIGH SHERIFF'S RETURN.**

Territory of Hawaii,  
City and County of Honolulu,—ss.

I, William Henry, High Sheriff of the Territory of Hawaii, do hereby certify and make return that on the 15th day of May, A. D. 1912, in obedience to the command herein contained and set forth in the

within Writ at Mokapu, District of Koolaupoko, in said County and Territory, I did execute the said Writ in the manner as follows, that is to say, by then and there placing Cecil Brown, trustee named in the within writ, through Fred Harrison, his agent, in the complete and absolute possession of the premises and personal property hereinbelow set forth and described.

An undivided one-half interest of Addie B. Gear and A. V. Gear in and to the property described in that certain Indenture of Lease made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances of the land of Mokapu, Island of Oahu, Territory of Hawaii; thirty-five acres of growing cotton; about twenty-seven bales of cotton; 1 mule; 1 boat; chickens; ducks; turkeys; cotton gin; press and bales; tools, farming implements and cotton seeds found on said premises in said Writ described and by excluding, removing and expelling from said premises all persons claiming in opposition to them.

I therefore return this Writ as fully satisfied this 16th day of May, A. D. 1912.

Witness my hand and seal this 16th day of May, A. D. 1912.

[Seal]

WM. HENRY,  
High Sheriff, Territory of Hawaii. [264]



*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

AT CHAMBERS.—IN EQUITY. (\$2.00 Stamps.)

FRED HARRISON,

Plaintiff,

versus

A. V. GEAR and ADDIE B. GEAR, His Wife,  
Defendants.

**Writ of Possession [in Harrison vs. Gear et ux. in  
Circuit Court].**

Territory of Hawaii, to the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy:

WHEREAS, on the 6th day of February, 1912, the plaintiff above named secured a Decree of Foreclosure of Mortgage and Lien in the above-entitled court and cause, decreeing that all and singular the property hereinafter set forth and described be sold at public auction according to law and the practice of this Honorable Court and in the manner prescribed by said Decree of Foreclosure aforesaid, to wit, the following property:

An undivided one-half interest of Addie B. Gear and A. V. Gear in and to the property described in that certain Indenture of Lease made by and between John D. Holt, Trustee, and A. V. Gear, dated June 1, A. D. 1910, recorded in Liber 343, pages 347-351, Hawaiian Registry of Conveyances, of the land of Mokapu, Island of Oahu, Territory of Hawaii.

Thirty-five (35) acres of growing cotton; about twenty-seven (27) bales of baled cotton; one mule, one boat, chickens, ducks, turkeys, cotton gin, press and bales, tools, farming implements and cotton and seed now on said premises;

WHEREAS, on the 24th day of February, 1912, the Commissioner appointed by said Court in said decree of foreclosure effected said sale of said property according to the terms of said decree, [265] as more fully appears from the Order Confirming Sale filed in the above-entitled cause on the 28th day of February, 1912, and sold all and singular the said property to Cecil Brown, Trustee; and

WHEREAS, said sale was duly confirmed and approved as appears from said Order Confirming Sale, and it appearing to the Court from the files and records herein that all matters and things necessary and proper to be done in connection with said foreclosure proceedings have been done and performed, and that said Cecil Brown, Trustee, the purchaser under said Commissioner's sale as aforesaid, is entitled to the possession of said property;

NOW, THEREFORE, you are commanded to cause, without delay, the said Cecil Brown, Trustee, or his agent, to have possession of the said property.

Done at Chambers in Honolulu, this 24th day of April, A. D. 1912.

HENRY E. COOPER,  
First Judge, First Judicial Circuit, Territory of  
Hawaii.

[Seal]

Attest: HENRY SMITH,  
Clerk.

[Endorsed]: E. No. 1814. Reg. 2, pg. 63. Circuit Court, First Circuit, Territory of Hawaii. Fred Harrison, Plaintiff, vs. A. V. Gear et al., Defendants. Writ of Possession. Filed Apr. 24, 1912, 1:55 P. M. and issued. J. A. Dominis, Clerk. Returned 11:15 A. M., May 17th, 1912. J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [266]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

AT CHAMBERS.—IN EQUITY. (\$2.00 Stamps.)  
CECIL BROWN, Trustee,

vs.

ROBERT WYLLIE DAVIS.

**Bill of Complaint.**

**PARTITION.**

To the Honorable Presiding Judge of the First Circuit, in Equity, at Chambers:

The Bill of Complaint of Cecil Brown, Trustee, of the city and county of Honolulu, Territory of Hawaii, plaintiff herein, respectfully alleges and shows as follows:

**I.**

That Robert Wyllie Davis, defendant herein, resides in said city and county of Honolulu.

**II.**

That on June 1, 1910, John D. Holt, Jr., Trustee, the owner and possessor of certain land hereinafter

described did, by an instrument in writing duly recorded in the office of the Registrar of Conveyances in Honolulu, in Liber 343, pages 347-351, demise and lease to one A. V. Gear, a certain piece of land called and known as Mokapu, situate in said city and county of Honolulu, for a term of 25 years from said June 1, 1910, as will more fully appear by copy of said lease attached hereto, marked "A" and made a part hereof. [267]

### III.

That thereafter by sundry mesne conveyances and for a valuable consideration an undivided one-half of said lease was duly conveyed to plaintiff.

### IV.

That thereafter by sundry mesne conveyances and for a valuable consideration one undivided half of said lease was duly conveyed to said defendant, Robert Wyllie Davis.

### V.

That plaintiff is now the owner of one undivided half of said lease and defendant is the owner of the other undivided half of said lease.

### VI.

That plaintiff and defendant are now in the possession of the lands demised by said lease.

### VII.

That plaintiff is desirous of having his interest in said lease partitioned and set apart to him in severalty.

WHEREFORE, plaintiff prays that defendant may be by the process of this court cited to be and



appear in this court at a time to be specified therein and a full and true answer make of the matters in this Bill of Complaint contained; that he may be bound by all Orders and Decrees that may be made herein; that he may be required to set up any claim or claims that he may have in or to said lease; that a Commissioner may be appointed by this Court to examine and report whether or not said leasehold interest in said lands is capable of being partitioned without great prejudice to the parties interested herein; that in case said leasehold [268] is capable of being so partitioned the interest of said plaintiff herein be set off to him in severalty, otherwise that said leasehold interests in said land be sold and the proceeds of sale divided between the plaintiff and defendant according to their respective interests therein, and for costs and such other and further relief as may be just.

Dated, Honolulu, May 27, 1912.

CECIL BROWN,  
Trustee.

THOMPSON, WILDER, WATSON &  
LYMER,

A. A. W.,  
Attorneys for Plaintiff.

Let process issue herein as prayed for returnable in ten (10) days after service.

HENRY E. COOPER,  
First Judge, First Circuit Court, Presiding in  
Equity, at Chambers.

Territory of Hawaii,  
City and County of Honolulu,—ss.

Cecil Brown, Trustee, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled suit; that he has read the foregoing Bill of Complaint and that the contents thereof are true.

CECIL BROWN,  
Trustee.

Subscribed and sworn to before me this 27th day of May, A. D. 1912.

[Seal] F. F. FERNANDES,  
Notary Public, First Judicial Circuit, Territory of Hawaii. [269]

**[Exhibit "A" to Bill of Complaint—Lease, June 1, 1910, Between John D. Holt, Trustee, and A. V. Gear.]**

Stamped \$2.

This Indenture of Lease made this 1st day of June, A. D. 1910, between John D. Holt, Trustee, of Honolulu, City and County of Honolulu, Territory of Hawaii, lessor, and A. V. Gear of the same place, lessee,

Whereas, on the 16th day of August, 1892, by a certain deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313-314, John K. Sumner of the City and County of Honolulu, Territory of Hawaii, conveyed unto Bruce Cartwright of the same place, certain land situated at Koolaupoko, Island of Oahu, known as the land of Mokapu, in trust, never-

theless, among other things, to pay the rents, issues and profits arising from or out of said land as directed in said deed of trust.

And whereas, the said John D. Holt was duly appointed and substituted to act as trustee in said deed of trust, in the place and stead of the said Bruce Cartwright and at the instance of the said Bruce Cartwright by an order of a Judge of the First Circuit Court of the said Territory of Hawaii, now this Indenture witnesseth:

That the said lessor doth hereby lease and demise unto said lessee all of that certain piece or parcel of land aforesaid situated at Koolaupoko, Island of Oahu, and known as the land of Mokapu and more particularly described in said aforementioned deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313-314.

To have and to hold the same with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining, unto the said lessee, his executors, administrators and assigns, for and during the term of twenty-five years from the first day of June, A. D. 1910. [270]

Yielding and praying therefor rent as follows:

For the first year the rental shall be free.

For the next ensuing four years the rent shall be at the rate of Three Hundred (\$300.00) Dollars per year, payable semi-annually in advance.

For the next ensuing five years the rent shall be at the rate of Four Hundred (\$400.00) Dollars per year, payable semi-annually in advance.

For the remaining fifteen years the rent shall be at

the rate of Five Hundred (\$500.00) Dollars per year, payable semi-annually in advance.

And the said lessor hereby covenants with said lessee that he, paying said rent as aforesaid, shall have peaceable and quiet possession of said land during said term.

And the said lessee hereby covenants with said lessor that he will pay said rent in manner aforesaid, together with all taxes or assessments which may be assessed against said land.

In witness whereof, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date interchangeably set their hands and seals the day and year first above written.

JNO. D. HOLT,  
Trustee.

A. V. GEAR.

**[Exhibit "A" to Bill of Complaint—Consent and Confirmation of Lease by Robert Wyllie Davis.]**

KNOW ALL MEN BY THESE PRESENTS, that I, Robert Wyllie Davis of Mokapu, Koolaupoko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms [271] of the aforementioned Deed of Trust.

ROBERT WYLLIE DAVIS.

Territory of Hawaii,  
City and County of Honolulu,—ss.

On this 13th day of July, 1910, before me person-



ally appeared John D. Holt, Trustee, and A. V. Gear, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[Seal] WILLIAM SAVIDGE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

Territory of Hawaii,  
City and County of Honolulu,—ss.

On this 4th day of August, 1910, before me personally appeared Robert Wyllie Davis, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

[Seal] WILLIAM SAVIDGE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

**[Exhibit "A" to Bill of Complaint—Assignment of  
Lease by A. V. Gear to C. A. Peterson, October  
12, 1910.]**

Stamped \$2.

I, A. V. Gear of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee named in the foregoing lease, in consideration of One Dollar and of the covenants hereinafter contained, do hereby assign, transfer and set over to C. A. Peterson of said Honolulu, the foregoing lease, the premises thereby demised, and all right, title and interest in and under the same. And I, the said assignee, in consideration of the foregoing assignment, hereby covenant with

the said assignor that I will pay the rent which may hereafter [272] become due according to the terms of said lease, and perform all of the covenants and stipulations in said lease contained which are to be performed by the lessee.

In witness whereof the parties hereto have hereunto and to another instrument in duplicate  
W. S. of like tenor and date, interchangeably set their hands and seals this 12th day of Oct.,  
A. D. 1910.

A. V. GEAR.

CHAS. A. PETERSON.

The date in the last line of the foregoing instrument was changed to "12th day of Oct." prior to acknowledgment hereof.

WILLIAM SAVIDGE.

**[Exhibit "A" to Bill of Complaint—Assignment of Lease by C. A. Peterson to Addie B. Gear, October 12, 1910.]**

Stamped \$2.

I, C. A. Peterson of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee by assignment of the foregoing lease, in consideration of One Dollar and of the covenants hereinafter contained do hereby assign, transfer and set over to Addie B. Gear of said Honolulu, the foregoing lease, the premises thereby demised, and all the right, title and interest which I have in and under the same. And I, the said assignee, in consideration of the foregoing assignment, hereby covenant with the said assignor that I will pay the rent which may hereafter become due according to the terms of said lease, and perform all

of the covenants and stipulations in said lease contained which are to be performed by the lessee.

In witness whereof, the parties hereto have hereunto and to another instrument in duplicate  
W. S. of like tenor and date, interchangeably set  
their hands and seals this 12th day of [273]  
Oct., A. D. 1910.

CHAS. A. PETERSON.

ADDIE B. GEAR.

The date in the last line of the foregoing instrument was changed to "12th day of Oct." prior to acknowledgment hereof.

WILLIAM SAVIDGE.

Territory of Hawaii,  
City and County of Honolulu,—ss.

On this 14th day of October, 1910, before me personally appeared A. V. Gear, Chas. A. Peterson and Addie B. Gear, to me known to be the persons described in and who executed the two foregoing instruments and acknowledged that they executed the same as their free act and deed.

[Seal] WILLIAM SAVIDGE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

**[Exhibit "A" to Bill of Complaint—Assignment of  
Lease by Addie B. Gear to Fred Harrison,  
October 21, 1910.]**

Stamped \$2.

I, Addie B. Gear of Honolulu, City and County of Honolulu, Territory of Hawaii, the lessee by assignment of the foregoing lease, in consideration of One Dollar to me in hand paid, do hereby assign, transfer

and set over to Fred Harrison of said Honolulu, the foregoing lease, the premises thereby demised, and all of the right, title and interest which I have in and under the same, which is an undivided half interest.

In witness whereof I have hereunto set my hand and seal this 21st day of October, A. D. 1910.

ADDIE B. GEAR.

City and County of Honolulu,  
Territory of Hawaii,—ss.

On this 15th day of November, [274] A. D. 1910, before me personally appeared Addie B. Gear, to me known to be the person described in and executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

[Seal]

ANTONE MANUEL,

Notary Public, First Judicial Circuit, Territory of  
Hawaii.

Entered of record this 6th day of May, A. D. 1911,  
at 10:53 o'clock A. M., and compared.

CHAS. H. MERRIAM,

Registrar of Conveyances.

[Endorsed]: Filed May 27, 1912, at 11:15 o'clock  
A. M. J. A. Dominis, Clerk. [275]

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*In the Circuit Court of the First Circuit, Territory  
of Hawaii.*

AT CHAMBERS.

(\$2.00 Stamps)

CECIL BROWN, Trustee,

vs.

ROBERT WYLLIE DAVIS.



**Chamber Summons [in Brown, Trustee, vs. Davis,  
in Circuit Court, Territory of Hawaii].**

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy.

YOU ARE COMMANDED to summon Robert Wyllie Davis, to appear ten days after service hereof, if he resides in the City and County of Honolulu, otherwise twenty days after service, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the courtroom at Honolulu, to answer the annexed Bill of Complaint of Cecil Brown, Trustee.

AND YOU ARE FURTHER COMMANDED, by order of the Honorable ———, Judge of the Circuit Court of the ——— Circuit.

And have you then there this Writ with full return of your proceedings thereon.

Witness the Honorable HENRY E. COOPER, First Judge of the Circuit Court of the 1st Circuit, at Honolulu, this 27th day of May, 1912.

[Seal]

J. A. DOMINIS,  
Clerk.

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Section 1769 Revised Laws. The time within which an act is to be done \* \* \* shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

Territory of Hawaii,  
City and County of Honolulu,—ss.

I, William Henry, High Sheriff of the Territory of

Hawaii, do hereby certify and make return that I served the within Summons and Bill of Complaint as follows:

On Robert Wyllie Davis, therein named as defendant, at Honolulu, City and County of Honolulu, Territory of Hawaii, this 28th day of May, A. D. 1912, by delivering to him a certified copy hereof and of the Bill of Complaint annexed hereto and at the same time showing him the original as herein directed.

Dated Honolulu, City and County of Honolulu, Territory of Hawaii, this 28th day of May, A. D. 1912.

WM. HENRY,  
High Sheriff, Territory of Hawaii.

[Endorsed]: E. No. 1828, Reg. 2, Pg. 77. Circuit Court, First Circuit. Cecil Brown, Trustee, vs. Robert Wyllie Davis. Chamber Summons. Issued at 11:15 o'clock A. M., May 27th, 1912. J. A. Dominis, Clerk. Returned at 2:55 o'clock P. M., May 29th, 1912. J. A. Dominis, Clerk.

[In pencil:] Pau. [276]

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

**AT CHAMBERS—IN EQUITY.**

**PARTITION: E. No. 1828.**

**Judiciary Dept.**

**Jun. 21, 1912.**

**Territory of Hawaii.**

**CECIL BROWN, Trustee,**

**Complainant,**

**vs.**

**ROBERT WYLLIE DAVIS,**

**Respondent.**

**Stipulation [That Respondent have to June 20, 1912,  
to Appear, Plead, etc., to Bill of Complaint].**

It is hereby stipulated between the parties hereto by their respective solicitors, that the respondent Robert Wyllie Davis have and he is hereby allowed to and including the 15th day of June, A. D. 1912, within which to appear, plead, demur to or answer the bill of complaint of complainant herein.

**THOMPSON, WILDER, WATSON &  
LYMER,**

**F. E. T.,**

**Solicitors for Complainant.**

**E. C. PETERS,**

**Solicitor for Respondent.**

**[Order Allowing Respondent to June 15, 1912, to  
Appear, Plead, etc., to Bill of Complaint.]**

**ORDER ALLOWING FURTHER TIME.**

Pursuant to the foregoing stipulation, it is hereby

ordered that the respondent above named have and he is hereby allowed to and including the 15th day of June, A. D. 1912, within which to appear, plead, demur to or answer the bill of complaint herein.

HENRY E. COOPER,

1st Judge Presiding at Chambers.

Honolulu, June 21st, 1912.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. E. No. 1828. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., vs. Robert Wyllie Davis. 1st Stipulation. Filed at 10:45 A. M., June 21, 1912. Henry Smith, Clerk. By W. B. Lymer. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Respondent. [277]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION: E. No. 1828.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Stipulation [Extending Time to June 20, 1912, to  
Appear, Plead, etc., to Bill of Complaint].**

It is hereby stipulated by and between the parties hereto that the respondent above named have and he is hereby allowed to and including the 20th day of



June, A. D. 1912, within which to appear, plead, demur to or answer the bill of complaint of plaintiff herein.

THOMPSON, WILDER, WATSON &  
LYMER,  
A. A. W.,

Attorneys for Plaintiff.

E. C. PETERS,

Attorney for Defendant.

Approved.

HENRY E. COOPER,  
Judge.

Honolulu, T. H., June 15th, 1912.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. E. No. 1828. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., vs. Robert Wyllie Davis. Judiciary Dept., Territory of Hawaii. Jun. 22, 1912. 2d Stipulation. Filed by E. C. P. Filed Jun. 17, 1912, 3:05 o'clock P. M. J. A. Dominis, Clerk. E. C. Peters, 210-211, McCandless Building, Honolulu, T. H., Attorney for Defendant. [278]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION.

CECIL BROWN, Trustee,

VS.

ROBERT WYLLIE DAVIS.

**Motion for Judgment and Decree Pro Confesso.**

Now comes Cecil Brown, Trustee, by the undersigned, his attorneys, and moves this Honorable Court for judgment and Decree *pro confesso* in the above-entitled suit on the ground that no answer, demurrer or other plea has been filed or entered therein within the time allowed by law and by the agreement of the parties thereto, and that the said Robert Wyllie Davis is in default.

All the papers, pleadings, the record of the clerk herein, and the affidavits of Henry Smith, Esq., and F. E. Thompson, Esq., are referred to and made a part of this motion.

CECIL BROWN,

Trustee.

By THOMPSON, WILDER, WATSON &  
LYMER,  
W. B. L.

Dated at Honolulu, this 21st day of June, A. D.  
1912. [279]

Territory of Hawaii,

City and County of Honolulu,—ss.

F. E. Thompson, being duly sworn, on oath deposes and says, that he is a member of the firm of Thompson, Wilder, Watson & Lymer, attorneys for Cecil Brown, trustee, plaintiff in the foregoing suit in partition in which Robert Wyllie Davis is the defendant (respondent); that no answer, demurrer or other pleading has been served upon said firm of Thompson, Wilder, Watson & Lymer within the time al-

lowed by law and by the agreement of the parties, and that the said Robert Wyllie Davis is, by reason of his failure to appear and answer, demur or otherwise plead in default.

F. E. THOMPSON.

Subscribed and sworn to before me this 21st day of June, A. D. 1912.

[Seal]

J. R. KENNY,

Notary Public in and for Circuit Court, First Judicial Circuit. [280]

Territory of Hawaii,

City and County of Honolulu,—ss.

Henry Smith, being duly sworn, on oath deposes and says that he is clerk of the Circuit  
 H. S. Court of the First Circuit Territory of Hawaii; that he has examined the files and records of the Circuit Court of the First Judicial Circuit, and particularly the files and record in that certain suit in equity numbered 1828 and entitled Cecil Brown, Trustee, vs. Robert Wyllie Davis, and that no answer, demurrer, plea or appearance has been filed or entered therein on the part of said Robert  
 H. S. Wyllie Davis, defendant (respondent) therein, since the institution of said suit on the 27th day of May, A. D. 1912.

HENRY SMITH.

Subscribed and sworn to before me this 21st day of June, A. D. 1912.

JOB BATCHELOR,

Clerk Cir. Court.

H. S. ~~Notary Public~~ First Judicial Circuit, Territory of Hawaii.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Trustee, vs. Robert Wyllie Davis. Motion and Affidavits. Filed at 11 A. M. June 21, 1912. Henry Smith, Clerk. Thompson, Wilder Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Cecil Brown, Tr. [281]

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**[Order that Original Bill of Brown, Trustee, be  
Taken Pro Confesso Against Davis.]**

*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

PARTITION.

CECIL BROWN, Trustee,

vs.

ROBERT WYLLIE DAVIS.

This cause came on to be heard this day upon a motion of the plaintiff to take the bill *pro confesso* as against Robert Wyllie Davis, defendant (respondent), Messrs. Thompson, Wilder, Watson & Lymer appearing for the motions, and upon hearing said motion and all matters in the premises, it appearing that the said defendant Robert Wyllie Davis has not filed his plea, answer, or demurrer in said cause within the time allowed by law and is in default for want of such plea, answer or demurrer,

IT IS ORDERED that the original bill of Cecil Brown, Trustee, be taken *pro confesso* against said Robert Wyllie Davis, defendant.



Done at Chambers this 21st day of June, A. D. 1912.

HENRY E. COOPER,

Judge of the Above-entitled Court.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Trustee, vs. Robert Wyllie Davis. Decree. Filed at 11 A. M. June 21, 1912. Henry Smith, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block Honolulu, Attorneys for Cecil Brown, Tr. [282]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION: EQ. No. 1828.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Demurrer.**

Comes now the defendant above named and demurs to the bill of complaint of complainant herein, and for ground of demurrer alleges:

1. That the bill of complaint herein does not state facts sufficient to entitle complainant to the relief as in and by said bill of complaint prayed for, or any relief.

WHEREFORE this respondent prays that the bill of complaint herein be dismissed and he go hence

with his costs herein incurred.

E. C. PETERS,  
Attorney for Defendant.

Honolulu, June 21, 1912.

**Certificate of Merits.**

This is to certify that the foregoing demurrer is not interposed for purposes of delay.

E. C. PETERS,  
Attorney for Defendant.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77 Eq. No. 1828. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., v. Robert Wyllie Davis. Demurrer. Filed at 5:30 P. M. June 21st, 1912. Henry Smith, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Defendant. [283]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION: EQ. No. 1828.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Joinder in Demurrer.**

Comes now the plaintiff above named by Messrs. Thompson, Wilder, Watson & Lymer, and joining in the demurrer heretofore filed by the plaintiff above

named on the 21st of June, 1912, in the above-entitled action, says that the Bill of Complaint heretofore filed herein, does state facts sufficient to entitle him, said plaintiff, to the relief as in and by said Bill of Complaint prayed for, and such facts your plaintiff is willing to aver and maintain.

CECIL BROWN,

Trustee.

By THOMPSON, WILDER, WATSON &  
LYMER,

W. B. L.,

His Attorneys.

Honolulu, June 26, 1912.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Trustee, Plaintiff, vs. Robert Wyllie Davis, Defendant. Joinder in Demurrer. Filed Jun. 26, 1912, 2:55 o'clock P. M. J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [284]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION: EQ. No. 1828.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Answer of Robert Wyllie Davis.**

To the Honorable the Presiding Judge at Chambers,  
in Equity, of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

Comes now Robert Wyllie Davis, respondent above named, now and at all times hereafter saving to himself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering admits, alleges and denies as follows, to wit:

1. Admits that this respondent resides in the City and County of Honolulu.

2. Denies that on June 1, A. D. 1910, or at any other time or at all, John D. Holt, Jr., Trustee, was the owner and/or possessor of certain land in said bill of complaint called and known as "Mokapu."

Denies that on said last-named day or at any other time or at all, said John D. Holt, Jr., as Trustee or otherwise, or as the owner and/or the possessor of otherwise, of certain land in said bill of complaint called and known as "Mokapu," did by [285] an instrument in writing or otherwise, or at all, demise and/or lease to one A. V. Gear a certain piece of land called and known as "Mokapu" for a term of twenty-five years from said June 1, A. D. 1910, or for any other term or at all.

And by way of further answer to paragraph two of said bill of complaint, this respondent alleges and



avers that heretofore and on, to wit, the 16th day of August, A. D. 1892, one John K. Sumner, for a good and valuable consideration, by indenture of deed of even date, of record in the office of the Registrar of Conveyances of the Territory of Hawaii at Honolulu, in Liber 136, at page 313, did grant, bargain and sell unto one Bruce Cartwright, his heirs and assigns forever, said piece or parcel of land called and known as "Mokapu," in trust for certain uses and purposes in said deed of trust enumerated, described and set forth, among other things, "to pay the rents, issues and profits arising from or out of said land to" the respondent "Robert Wyllie Davis during the term of his natural life, or in the discretion of said Robert Wyllie Davis, to permit him to reside upon said premises and while so residing to use the same for grazing or agricultural purposes." That pursuant to said trust deed, with the permission of the grantee therein named, this respondent on said last-named day went into possession of said premises to reside thereon and use the same for grazing and agricultural purposes, and ever since has been in possession thereof and residing thereon and using the same for grazing and agricultural purposes.

That thereafter and on, to wit, the 29th day of August, A. D. 1902, the said Bruce Cartwright having resigned his said trust under the said deed of trust aforesaid, one John D. Holt was by a Judge of the Circuit Court of the First Judicial Circuit appointed and substituted to act as trustee under said deed of trust in the place and stead of the said Bruce Cartwright, and the said John D. Holt, Jr., thereupon

and thereafter [286] pretended to act as the successor in trust of the said Bruce Cartwright under said deed of trust. But this respondent is advised and believes and upon such advice and belief alleges that the said Judge of said First Circuit Court was without jurisdiction of the person and/or the subject matter of said trust, and without power and/or authority to appoint the said John D. Holt, Jr., as trustee under said deed in the place and stead of and as substitute of the said Bruce Cartwright, and the pretended order or decree appointing the said John D. Holt, Jr., as trustee under said deed of trust, was null and void, in this, that on said 16th day of August, A. D. 1892, this respondent became and was possessed of life estate in and to the said lands and premises known as "Mokapu" freed and discharged from any and all trusts, and the said John D. Holt, Jr., never nor at all has been the owner of the legal title of said premises under said deed of trust from John K. Sumner to Bruce Cartwright, Trustee aforesaid.

That thereafter and on, to wit, the 1st day of June, A. D. 1910, said John D. Holt, Jr., pretending to act as trustee under said deed of trust from John K. Sumner to Bruce Cartwright and as the pretended successor in trust thereunder of the said Bruce Cartwright, without authority or consent of this respondent, but mutually conspiring with one A. V. Gear to cheat and defraud this respondent and deprive this respondent of said premises and the use and possession thereof, made and executed to said A. V. Gear a pretended lease of said premises known as "Mokapu" for the term of twenty-five years from the

1st day of June, A. D. 1910, a copy of which is appended to plaintiff's bill of complaint as exhibit "A," said premises on said 1st day of June, A. D. 1910, being reasonably worth an annual rental of \$1,500.

That thereafter and on, to wit, the — day of June, A. D. 1912, the said A. V. Gear falsely representing and pretending [287] to this respondent that it was for the best interest of this respondent that this respondent consent to said lease and ratify and confirm the same, secured from this respondent his alleged written consent, ratification and confirmation thereto, a copy of which is appended to plaintiff's bill of complaint as a part of exhibit "A," but said ratification, consent and confirmation was without consideration and void.

And this respondent is advised and upon such advice alleges that said pretended lease from the said John D. Holt, Jr., Trustee, to the said A. V. Gear, is and was null and void and of no force and/or effect, but that if the same be of legal force and effect, that the term thereof in equity and good conscience should be reformed by this Honorable Court in this, that said lease contain the usual covenants of an agricultural lease including a covenant against waste and the right of re-entry by the lessor in the event of the failure by the lessee to pay the rent reserved and obey and conform to the covenants and agreements in the lease on the part of the lessee to be kept and performed, and the rent reserved be the sum of \$1,500 per annum for each and every year during the term denied.

3. Denies that thereafter and by sundry mesne

conveyances or otherwise, or at all, and for a valuable or any consideration, an undivided one-half or any interest of and in said lease was duly and/or at all conveyed to plaintiff.

And by way of further answer to the allegations of paragraph three of said bill of complaint contained, this respondent alleges and avers that heretofore and on, to wit, the 1st day of January, A. D. 1907, this respondent, Robert W. Davis, for a good and valuable consideration did grant, bargain, sell and convey to the said John K. Sumner an undivided one-half share or interest in and to the land and premises known as "Mokapu," and ever since said last-named day said John K. Sumner has been and [288] now is the owner and holder thereof, subject to a defeasance of the legal title in the said John K. Sumner and the reconveyance thereof by him to this respondent at any time on or before January 2d, A. D. 1916, upon the payment to the said John K. Sumner of the sum of \$2,794.93, with interest from the 1st day of January, A. D. 1906, to the date of reconveyance at the rate of seven per cent per annum, and thereafter and on, to wit, the 2d day of January, A. D. 1906, this respondent conveyed by way of mortgage to the said John K. Sumner and undivided one-half share and interest in and to said land and premises known as "Mokapu," and said mortgage is in full force and effect and not satisfied or discharged.

That heretofore and on, to wit, the 12th day of October, A. D. 1910, said A. V. Gear did execute a certain indenture of assignment wherein and whereby he did pretend to assign unto one C. A. Peterson the



said pretended lease to him from said John D. Holt, Jr., aforesaid, and the said Chas. A. Peterson thereafter and on the day and year aforesaid by a certain indenture of assignment attempted to assign all the right, title and interest of him, said Chas. A. Peterson, in and to said lease, to Addie B. Gear, the wife of said A. V. Gear; but this respondent is informed and believes and upon such information and belief alleges it to be the fact that both the said Chas. A. Peterson and the said Addie B. Gear, at the time of the alleged assignment of said lease to him and her respectively, well knew all the matters and things herein alleged of and concerning said lease and premises as alleged herein, and took the same with full knowledge thereof, and this affiant is further informed and believes and so deposes, the said Addie B. Gear was not the real party in interest, but that she, the said Addie B. Gear, took the said pretended lease as the trustee for the said A. V. Gear. [289]

That thereafter and on, to wit, the 21st day of October, A. D. 1910, and on the 9th day of June, A. D. 1911, the said Addie B. Gear did assign said lease by way of mortgage to one Fred Harrison, but the said Fred Harrison took said alleged assignment with full knowledge of all the matters and things herein alleged of and concerning said lease and said premises known as "Mokapu" hereinbefore alleged, and this respondent is informed and believes that this plaintiff is the trustee of the said Fred Harrison, and as such trustee upon foreclosure of said mortgage to the said Fred Harrison did purchase said pretended lease for and on behalf of the said Fred Harrison with full knowl-

edge of all the matters and things hereinbefore alleged of and concerning said lease and said premises known as "Mokapu," and that said complainant, as trustee, claims the undivided one-half interest in and to said lease from the said John D. Holt under and by virtue of such foreclosure of mortgage; but this respondent is advised and upon such advice alleges that said complainant is not the owner of an undivided one-half interest in and to said lease, nor is the owner of any interest in and to the said premises and land known as "Mokapu," and that this court is without jurisdiction to try and determine in equity the alleged title of said complainant in and to the said premises known as "Mokapu," but complainant should and must proceed at law to try his title thereto.

4. Denies that thereafter by sundry mesne conveyances and/or for a valuable or other consideration one undivided half of said lease was duly or at all conveyed to this respondent.

And by way of further answer to the allegations of paragraph four of said bill of complaint contained this respondent alleges that on, to wit, the 16th day of October, A. D. 1911, the said A. V. Gear, pretending to act as the lessee under said pretended lease to him from the said John D. Holt, pretended to [290] lease and demise to this respondent an undivided one-half share or interest in and to said lease, but this respondent is advised and upon such advice alleges that he acquired no interest under said assignment and is not the owner or holder of any interest in "Mokapu" under and by virtue of said lease.

5. Denies that plaintiff is now the owner of an undivided one-half of the said lease.

6. Denies that the plaintiff is in the possession of said lands called and known as "Mokapu."

WHEREFORE, this respondent prays the judgment of this Honorable Court that the within action be abated and that plaintiff be left to the trial and determination of his alleged claim in and to the lands known as "Mokapu" to proceedings of law to establish or determine the same; or, in the alternative, that this Honorable Court decree that the lease from John D. Holt to A. V. Gear is null and void and of no force and/or effect; or, in the alternative, should this court hold that said lease to the said A. V. Gear is a good, valid and subsisting lease, that the said lease be decreed to be subject to the assignment of a one-half interest therein in this respondent and be reformed to contain the usual covenants of an agricultural lease including a covenant against waste and right of re-entry by the lessor in the event of the failure by the lessee to observe and perform the covenants and agreements thereof on his part to be kept and performed, and that said lease be further reformed in respect to the reserved rental to the extent of reserving a rental thereunder of the sum of \$1,500 per annum, and that this respondent have such other and further relief in the premises as to this court may seem proper.

And this respondent will ever pray.

ROBERT W. DAVIS. [291]

City and County of Honolulu,  
Territory of Hawaii,—ss.

Robert W. Davis, being first duly sworn, on oath deposes and says: That he is the respondent in the foregoing action named; that he has read the foregoing answer and knows the contents thereof and that the same is true, except as to those matters and things alleged upon information, advice or belief, and as to those matters so alleged that he believes them to be true.

ROBERT W. DAVIS.

Subscribed and sworn to before me this 24th day of July, A. D. 1912.

[Seal]

E. C. PETERS,

Notary Public 1st Judicial Circuit, Territory of  
Hawaii.

[Endorsed]: Service of the Within Answer of Robert Wyllie Davis is Hereby Admitted this 24th Day of July, A. D. 1912. F. E. Thompson, Attorneys for Plaintiff. Eq. No. 1828. Reg. 2/77 Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Trustee, vs. Robert Wyllie Davis. Answer. Filed Jul. 24, 1912, 3:45 o'clock P. M. J. A. Dominis, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Defendant. [292]



*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION: EQ. No. 1828.

CECIL BROWN, Trustee,

Plaintiff,

versus

ROBERT WYLLIE DAVIS,

Defendant.

**The Replication of Cecil Brown, Trustee, Plaintiff,  
to the Answer of Robert Wyllie Davis.**

This repliant saving and reserving unto himself all and all manner of advantage and exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto says that he does and will aver, maintain and prove his said bill to be true, certain and sufficient in law and that the answer is uncertain, evasive and insufficient in law to be replied unto by this repliant, without this, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto, confessed or avoided, traversed or otherwise, is true; all of which matters this repliant is ready to aver, maintain and prove as this Honorable Court

shall direct and humbly pray as in and by said bill he has already prayed.

CECIL BROWN, Trustee,  
Plaintiff,

By THOMPSON, WILDER, WATSON &  
LYMER,

A. A. W.,  
His Attorneys.

Honolulu, July 25, 1912.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Trustee, Plaintiff, vs. Robert Wyllie Davis, Defendant. The Replication of Cecil Brown, Trustee, Plaintiff, to the Answer of Robert Wyllie Davis. Filed at 9:35 A. M. July 26, 1912. Henry Smith, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [293]

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*Circuit Court, First Judicial Circuit, Territory of  
Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION.

CECIL BROWN, Trustee,

vs.

ROBERT WYLLIE DAVIS.

**Motion [to Said Cause].**

Now comes Cecil Brown, Trustee plaintiff in the above-entitled suit by his attorneys, Thompson,

Wilder, Watson & Lymer, and moves this Honorable Court that said suit be set for trial.

This motion is based on the record herein and on all the pleadings and papers on file herein.

Dated Honolulu, July 26, 1912.

CECIL BROWN, TRUSTEE,  
Plaintiff.

By THOMPSON, WILDER, WATSON &  
LYMER,

A. A. W.,  
His Attorneys.

#### NOTICE.

To E. C. Peters, Esquire, Attorney for Defendant:

Take notice that the foregoing motion will be presented before the Honorable Henry E. Cooper, First Judge, Circuit Court, at his courtroom in Honolulu on Monday the 29th day of July, A. D. 1912 at 10 o'clock A. M., or as soon thereafter as counsel may be heard.

THOMPSON, WILDER, WATSON &  
LYMER,

A. A. W.,  
Attorneys for Plaintiff.

Honolulu, July 26, 1912.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., vs. Robert Wyllie Davis. Motion and Notice. Filed Jul. 26, 1912, 3:50 o'clock P. M. J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [294]

*In the Circuit Court of the First Circuit, Territory  
of Hawaii.*

PARTITION.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Decision on Motion to Set Suit for Hearing.**

This is a motion to set for hearing a partition suit. The defendant sets out in his sworn answer, a sworn answer being required under the pleadings, a title to the entire estate in himself.

It is well settled that a court of equity will not assume jurisdiction in a partition suit where the defendant shows a clear legal title in himself to the entire estate, or shows that there is a *bona fide* dispute as to the title. The only question before the Court is whether or not the Court will abate the proceedings to allow plaintiff to prove his title on the law side, from a reading of the pleadings only.

As, in case the pleadings disclose a good title in the plaintiff, despite the denial of plaintiff's title by the defendant, the Court will proceed to hear the suit, so, in my opinion, where the pleadings disclose a good title in the defendant to the entire estate, or a *bona fide* dispute of the title, the Court will abate the partition suit pending the determination of the legal title.

Lucas v. King, 10 N. J. Eq. 277.



The motion to set is therefore denied until such time as the plaintiff shall have determined his title at law.

Honolulu, August 14, 1912.

WM. L. WHITNEY,  
Second Judge.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., v. Robert Wyllie Davis. Decision on Motion to Set Suit for Hearing. Filed Aug. 14, 1912, at 2:30 o'clock P. M. A. K. Aona, Clerk. Pau. [295]

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*In the Circuit Court of the First Circuit, Territory  
of Hawaii.*

PARTITION.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Appeal and Notice of Appeal.**

Now comes Cecil Brown, Trustee, plaintiff in the above-entitled suit, by his attorneys, Thompson, Wilder, Watson and Lymer, and gives notice of his intention to appeal, and hereby does appeal, to the Supreme Court of the Territory of Hawaii from that certain decree and order of the Honorable W. L. Whitney, Second Circuit Judge, denying plaintiff's motion to set the above suit for trial, dated August 14, 1912.

Dated Honolulu, August 15, 1912.

CECIL BROWN,  
Trustee.

By His Attorneys,  
THOMPSON, WILDER, WATSON &  
LYMER,

A. A. W.

[Endorsed]: E. No. 1828. Reg. 2, pg. 77. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., Plaintiff, vs. Robert Wyllie Davis, Defendant. Appeal and Notice. Filed Aug. 15, 1912, 3:50 o'clock P. M. J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [296]

[Endorsed]: Number 1828, Equity Division. Circuit Court, First Circuit. Cecil Brown, Tr., vs. Robert Wyllie Davis. 1912. Bill for Partition. Entered in Docket 29, page 21, Record —, page —. J. A. Dominis, Clerk.

No. 757. Received and filed in the Supreme Court at 8:40 A. M., Jany. 14, 1914. J. A. Thompson, Clerk. [297]

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*In the Supreme Court of the Territory of Hawaii,*  
October Term, 1912.

CECIL BROWN, Trustee,

Appellant,

vs.

ROBERT WYLLIE DAVIS,

Appellee.

**Notice of Decision on Appeal.**

To the Honorable WILLIAM L. WHITNEY, Second  
Judge of the Circuit Court of the First Judicial  
Circuit:

Territory of Hawaii:

You will please take notice that the Supreme Court  
in the above-entitled cause has made the following  
decision on appeal:

**“DECISION ON APPEAL.**

“In the above-entitled cause, pursuant to the opin-  
ion of the above-entitled court filed October 16, 1912,  
the order appealed from is affirmed.

“Dated Honolulu, T. H., October 25, 1912.

“By the Court.

“[Seal] (Sig.) J. A. THOMPSON,  
“Clerk Supreme Court.”

**Certificate.**

Territory of Hawaii,

City and County of Honolulu,—ss.

I, J. A. Thompson, Clerk of the Supreme Court  
of the Territory of Hawaii, do hereby certify that  
the foregoing document and attached hereto is  
a full, true and correct copy of the original “Notice  
of Decision on Appeal,” which is now on file in the  
office of the Clerk of the Supreme Court in a cause  
entitled, “Cecil Brown, Trustee, Plaintiff, against  
Robert Wyllie Davis, Respondent,” (Number 657).

In witness whereof I have hereunto affixed my  
hand and the seal of said Supreme Court, at Hono-

lulu, city and county of Honolulu, this 25th day of October, A. D. 1912.

[Seal]

J. A. THOMPSON,

Clerk Supreme Court, Territory of Hawaii.

[Endorsed]: Eq. 1828. Reg. 2, pg. 77. Pau. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., Appellant, vs. Robert Wyllie Davis, Appellee. Certified Copy of Notice of Decision on Appeal from the Supreme Court. Filed Oct. 25, 1912, 4 o'clock P. M. J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Appellant. [298]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

PARTITION.

EQUITY NO. —.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Discontinuance.**

Now comes the plaintiff above named, by William B. Lymer, his attorney, and discontinues the above-entitled suit, at his, said plaintiff's costs.

CECIL BROWN,

Trustee.

By WILLIAM B. LYMER,

His Attorney.



Dated Honolulu, March 15, 1915.

The foregoing discontinuance is hereby allowed and approved, this 17th day of March, 1915.

[Seal]

C. W. ASHFORD,

First Judge, First Circuit Court.

[Endorsed]: Eq. No. 1828. Reg. 2, pg. 77. No. ——. In the Circuit Court, First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity. Cecil Brown, Trustee, Plaintiff, v. Robert Wyllie Davis, Defendant. Discontinuance. 29/21. Filed at 2:20 o'clock P. M., March 17th, 1915. J. A. Dominis, Clerk. William B. Lymer, Attorney for Plaintiff. [299]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January Term, 1913.

(\$2 Stamps.)

**ACTION TO QUIET TITLE.**

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Complaint.**

To the Honorable Presiding Judge of the Circuit Court of the First Circuit:

The undersigned, Cecil Brown, Trustee, of the city and county of Honolulu, Territory of Hawaii, plaintiff herein, complains of Robert Wyllie Davis,

of said city and county of Honolulu, defendant herein, and for cause of action alleges:

1. That the plaintiff is entitled to one undivided half for a term of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu aforesaid, known as the land of Mokapu, and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the Registrar of Conveyances in said Honolulu, in Book 343, pages 347-351, a copy of which lease is hereto attached and made a part hereof marked exhibit "A."

2. That defendant claims said undivided one-half of said land adversely to plaintiff, and plaintiff is desirous of having the title thereto adjudicated and quieted. [300]

3. That defendant is a necessary party to the complete determination and settlement of the question of title involved herein.

WHEREFORE, plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term hereof, unless sooner disposed of by judicial authority; that defendant may be required to set up any adverse claim which he may have in and to said undivided half of said land; and for costs.

Dated Honolulu, January 15th, 1913.

CECIL BROWN,  
Trustee.

Plaintiff,

THOMPSON, WILDER, WATSON &  
LYMER,

A. A. W.

W. T. RAWLINS,

Attorneys for Plaintiff.

Territory of Hawaii,

City and County of Honolulu,—ss.

Cecil Brown, Trustee, being duly sworn, deposes and says: That he is the plaintiff above named; that he has read the foregoing complaint and that the same is true.

CECIL BROWN,  
Trustee.

Subscribed and sworn to before me this 15th day of January, A. D. 1913.

[Seal]

F. F. FERNANDES,

Notary Public, First Judicial Circuit, Territory of Hawaii. [301]

**Exhibit "A" [to Complaint].**

THIS INDENTURE of Lease made this 1st day of June, A. D. 1910, between John D. Holt, Trustee, of Honolulu, City and County of Honolulu, Territory of Hawaii, lessor, and A. V. Gear of the same place, lessee,

WHEREAS, on the 16th day of August, 1892, by a certain deed of trust recorded in the Register Of-

fice, Oahu, in Liber 136, pages 313-314, John K. Sumner of the City and County of Honolulu, Territory of Hawaii, conveyed unto Bruce Cartwright of the same place, certain land situated at Koolaupoko, Island of Oahu, known as the land of Mokapu, in trust, nevertheless, among other things, to pay the rents, issues and profits arising from or out of said land as directed in said deed of trust,

AND WHEREAS, the said John D. Holt was duly appointed and substituted to act as trustee in said deed of trust, in the place and stead of the said Bruce Cartwright, and at the instance of the said Bruce Cartwright, by an order of a Judge of the First Circuit Court of the said Territory of Hawaii,

NOW THIS INDENTURE WITNESSETH: That the said lessor doth hereby lease and demise unto said lessee all of that certain piece or parcel of land aforesaid situated at Koolaupoko, Island of Oahu, and known as the land of Mokapu and more particularly described in said aforementioned deed of trust recorded in the Register Office, Oahu, in Liber 136, pages 313-314.

TO HAVE AND TO HOLD the same with all the rights, privileges and appurtenances thereunto belonging or in anywise appertaining, unto the said lessee, his executors, administrators and assigns for and during the term of twenty-five years from the first day of June, A. D. 1910.

Yielding and paying therefor rent as follows:  
[302]



For the first year the rental shall be free.

For the next ensuing four years the rent shall be at the rate of Three Hundred (\$300.00) Dollars per year, payable semi-annually in advance.

For the next ensuing five years the rent shall be at the rate of Four Hundred (\$400.00) Dollars per year, payable semi-annually in advance.

For the remaining fifteen years the rent shall be at the rate of Five Hundred (\$500.00) Dollars per year, payable semi-annually in advance.

And the said lessor hereby covenants with said lessee that he, paying said rent as aforesaid, shall have peaceable and quiet possession of said land during said term.

And the said lessee hereby covenants with said lessor that he will pay said rent in manner aforesaid, together with all taxes or assessments which may be assessed against said land.

IN WITNESS WHEREOF, the parties hereto have hereunto and to another instrument in duplicate of like tenor and date, interchangeably set their hands and seals the day and year first above written.

(S.) JNO. D. HOLT, Trustee.

“ A. V. GEAR.

KNOW ALL MEN BY THESE PRESENTS:

That I, Robert Wyllie Davis of Mokapu, Koolau-poko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of use give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or

which may hereafter accrue to either of us in the future under the terms of the aforementioned Deed of Trust.

(S.) ROBERT WYLLIE DAVIS. [303]

Territory of Hawaii,

City and County of Honolulu,—ss.

On this 13th day of July, 1910, before me personally appeared John D. Holt, Trustee, and A. V. Gear to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[Seal]

(S) WILLIAM SAVIDGE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

Territory of Hawaii,

City and County of Honolulu,—ss.

On this 4th day of August, 1910, before me personally appeared Robert Wyllie Davis, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

[Seal]

(S) WILLIAM SAVIDGE,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

[Endorsed]: Filed Jan. 16, 1913, 11:15 o'clock  
A. M. J. A. Dominis, Clerk. [304]

*In the Circuit Court of the First Circuit, Territory  
of Hawaii.*

A. D. 1913, Term.

(\$2 Stamps)

TERM SUMMONS.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Summons.**

The Territory of Hawaii, to the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the City and County of Honolulu, —— or His Deputy:

YOU ARE COMMANDED to summon Robert Wyllie Davis, defendant, in case he shall file written answer within twenty days after service hereof to be and appear before the said Circuit Court at the term thereof pending immediately after the expiration of twenty days after service hereof; provided, however, if no term be pending at such time, then to be and appear before the said Circuit Court at the next succeeding term thereof, to wit, the A. D. 1914 term thereof, to be holden at Honolulu, City and County of Honolulu, on Monday, the 12th day of January next, at 10 o'clock A. M., to show cause why the claim of Cecil Brown, Trustee, plaintiff, should not be awarded to him pursuant to the tenor of his annexed complaint.

And have you then there this Writ with full return of your proceedings thereon.

WITNESS the Honorable Presiding Judge of the Circuit Court of the First Circuit at Honolulu aforesaid, this 16th day of January, 1913.

[Seal]

J. A. DOMINIS,  
Clerk.

Territory of Hawaii,  
City and County of Honolulu,—ss.

I, William Henry, High Sheriff of the Territory of Hawaii, do hereby certify and make return that I served the within Summons, Complaint and Exhibit "A" as follows:

On Robert Wyllie Davis, therein named as defendant, at Kaneohe, District of Koolaupoko, City and County of Honolulu, Territory of Hawaii this 18th day of January, A. D. 1913, by delivering to him a certified copy hereof and of the Complaint and Exhibit "A" annexed hereto and at the same time showing him the original as herein directed.

Dated Honolulu, City and County of Honolulu, Territory of Hawaii this 18th day of January, A. D. 1913.

WM. HENRY,

High Sheriff, Territory of Hawaii.

Lr. 7695. Reg. 4, pg. 159. Circuit Court, First Circuit. Cecil Brown, Tr., Plaintiff, vs. Robert Wyllie Davis, Defendant. Term Summons. Issued at 11:15 o'clock A. M., Jan. 16th, 1913. J. A. Dominis, Clerk. Returned at 11 o'clock A. M., Jan. 20th, 1913. J. A. Dominis, Clerk.



[Written in pencil across face and margin of endorsement.]

9.75

13.75

29/171 Pau. Motion for nonsuit granted. Chin  
set. [305]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January, A. D. 1913, Term.

ACTION TO QUIET TITLE: L. No. 7695.  
CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Answer.**

Comes now the defendant above named and by way of answer to the complaint of plaintiff herein denies the allegations of paragraph one and paragraph two of said complaint.

And by way of further answer thereto, defendant alleges and avers:

1. That he is the owner in fee simple of an undivided one-half interest of said land known as "Mokapu" and plaintiff has no right, title, interest and or estate in and to the whole or any part of said land.

WHEREFORE, defendant prays that he be hence dismissed, with his costs herein incurred.

Feb. 7th, 1913.

E. C. PETERS,  
Attorney for Defendant.

[Endorsed]: A. 7695. Reg. 4, pg. 159. No.——. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown vs. R. W. Davis. Answer. Filed at 5 P. M., Feb. 7, 1913. Henry Smith, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for ——. [306]

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*In the Circuit Court of the Territory of Hawaii,  
Territory of Hawaii.*

January, A. D. 1913, Term.

ACTION TO QUIET TITLE: L. No. 7695.  
CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Demand for Jury Trial.**

Comes now the defendant above named and demands a trial by jury herein.

Feb. 7th, 1913.

E. C. PETERS,  
Attorney for Defendant.

[Endorsed]: L. 7695. Reg. 4, pg. 159. No. ——. Circuit Court, First Circuit, Territory of Hawaii.

Cecil Brown vs. R. W. Davis. Jury Demand. Filed at 5 P. M., Feb. 7, 1913. Henry Smith, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H. Attorney for ——. [307]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

**ACTION TO QUIET TITLE.**

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Motion to Set.**

Comes now the plaintiff above named, by his attorneys, Thompson, Wilder, Watson & Lymer, and moves this Honorable Court that the above-entitled cause be set for trial on a day certain.

Dated Honolulu, April 4, 1913.

CECIL BROWN, Trustee,

Plaintiff.

By THOMPSON, WILDER, WATSON &  
LYMER,

W. B. L.,

His Attorneys,

**Notice.**

To Defendant Above Named and to E. C. Peters, Esquire, His Attorney:

You and each of you will please take notice that the foregoing Motion to Set will be presented be-

fore the Honorable W. L. Whitney, Second Judge of the Circuit Court, First Judicial Circuit, Territory of Hawaii, at his courtroom in the Judiciary Building, Honolulu, on Monday, April 7, 1913, at 9 o'clock A. M., or as soon thereafter as counsel may be heard.

THOMPSON, WILDER, WATSON &  
LYMER,

W. B. L.,

Attorneys for Plaintiff.

[Endorsed]: L. 7695. Reg. 4, pg. 159. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., Plaintiff, vs. Robert Wyllie Davis, Defendant. Motion to Set and Notice. Filed Apr. 4, 1913, 3:40 o'clock P. M. J. A. Dominis, Clerk. Thompson, Wilder, Watson & Lymer, 3-11 Campbell Block, Honolulu, Attorneys for Plaintiff. [308]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January, A. D. 1913, Term.

ACTION TO QUIET TITLE: L. No. 7695.  
CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.



**Cost Bill.**

Comes now the defendant herein and presents this his cost bill herein, and respectfully asks that the same upon presentation be allowed:

Answer and one copy.....	\$ 4.50
Presence at trial.....	3.00
Cost bill, copy and service.....	50
Attendance upon taxation of costs..	1.00
Costs of court.....	13.75

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Total      \$22.75

Dated this 25th day of June, A. D. 1913.

E. C. PETERS,

Attorney for Defendant.

Costs are hereby taxed in the sum of \$22.75.

WM. L. WHITNEY,

Presiding Judge at Trial. [309]

**Notice [of Presentation of Cost Bill].**

To the Above-named Plaintiff and Messrs. Thompson, Wilder, Watson & Lymer, His Attorneys.

You and each of you will hereby please take notice that the foregoing cost bill will be presented to his Honor W. L. Whitney, Second Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, in his courtroom in the Judiciary Building at Honolulu, city and county of Honolulu, Territory aforesaid, on Friday next, the 27th day of June, A. D. 1913, at the hour of two (2) o'clock P. M. of said day, or as soon thereafter as counsel can be heard.

Dated this 25th day of June, A. D. 1913.

E. C. PETERS,

Attorney for Defendant.

[Endorsed]: L. 7695. Reg. 4, pg. 159. L. No. 7695. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., Plaintiff, vs. Robert Wyllie Davis, Defendant. Cost Bill and Notice. Filed 5:30 P. M., June 25, 1913. Henry Smith, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Defendant. [310]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January, A. D. 1913, Term.

ACTION TO QUIET TITLE: L. No. 7695.

CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

**Decision.**

This is an action at law to quiet title.

Upon the trial and prior to plaintiff having rested, he, by his counsel, prayed the Court that a nonsuit be entered herein.

Let judgment for a nonsuit be entered accordingly.

Dated this 25th day of June, A. D. 1913.

WM. L. WHITNEY,

Judge Presiding at Trial.

[Endorsed]: L. 7695. Reg. 4, pg. 159. L. No. 7695, Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Trustee, Plaintiff, vs. Robert Wyllie Davis, Defendant. Decision. Filed 12:05 P. M., June 26, 1913. Henry Smith, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Defendant. [311]

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*In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.*

January, A. D. 1913, Term.

ACTION TO QUIET TITLE: L. No. 7695.  
CECIL BROWN, Trustee,

Plaintiff,

vs.

ROBERT WYLLIE DAVIS,

Defendant.

### **Judgment.**

The within action at law to quiet title came on regularly for hearing before this Court, the Honorable W. L. Whitney, Second Judge thereof, presiding, this —— day of May, A. D. 1913, when the parties appeared and were at issue to the Court, jury having been waived.

Plaintiff having asked that a voluntary nonsuit be entered and it having been so ordered:

THEREFORE, IT IS ADJUDGED, that the complaint herein be dismissed without prejudice and

defendant recover of plaintiff his costs taxed at \$22 75/100.

By the Court,  
JOHN MARCALLINO,  
Clerk.

Entered this 27th day of June, A. D. 1913.

JOHN MARCALLINO,  
Clerk.

[Endorsed]: L. No. 7695. Circuit Court, First Circuit, Territory of Hawaii. Cecil Brown, Tr., Plaintiff, vs. Robert Wyllie Davis. Judgment. Filed June 27/13. A. K. Aona, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for Defendant. [312]

[Endorsed]: Number 7695. Law Division. Circuit Court, First Circuit. Cecil Brown, Tr., vs. Robert Wyllie Davis. 1913. Action to Quiet Title. Entered in Docket 29, page 171, Record 4, page 159. J. A. Dominis, Clerk.

No. 757. Received and filed in the Supreme Court, January 14, 1914, at 8:40 A. M. J. A. Thompson, Clerk.

No. 814. Rec'd and filed in the Supreme Court, November 28, 1914, at 9:45 A. M. Robert Parker, Jr., Assistant Clerk. [313]



## [Opinion.]

*In the Supreme Court of the Territory of Hawaii.*  
October Term, 1914.

FRED HARRISON

vs.

ROBERT WYLLIE DAVIS.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

Hon. W. L. WHITNEY, Judge.

Argued February 11, 1915. Decided March 4, 1915.

ROBERTSON, C. J., QUARLES, J., and Circuit  
Judge ASHFORD in Place of WATSON, J.,  
Disqualified.

Quieting Title—Statutory Action—Title in Stranger.

In an action to quiet title where the plaintiff has adduced evidence of title a defendant who has no title may not defeat the plaintiff's case by showing that one not a party to the action has a title superior to that relied on by the plaintiff.

Trusts—Alienation of Equitable Interest—Object of Trust.—The right of alienation is not a necessary incident to an equitable interest to income or support for the life of the beneficiary, and it does not exist where it would be destructive of the trust or is incompatible with its purposes though there be no express prohibition against alienation. [314]

OPINION OF THE COURT BY ROBERTSON,  
C. J.

This case was previously before this Court on exceptions brought by the plaintiff. *Ante*, p. 51. As stated in the former opinion, the plaintiff seeks to have quieted as against the defendant his claim of title to an undivided one-half of the land of Mokapu, Island of Oahu, for a term of years which was demised originally by Holt, trustee, to one Gear, by an indenture dated June 1st, 1910. The common source of title under which these parties claim is a trust deed executed by John K. Sumner on August 16, 1892, the substance of which was set forth in the former opinion.

At the trial of an action to quiet title under the statute (R. L. Ch. 132) it is incumbent upon the plaintiff to prove a title in or to the land in dispute, and, if he fails to do so, it will be unnecessary for the defendant to make any showing. In case each party adduces evidence of title and it appears that the claims are adverse the Court will decide between them, but the defendant may not defeat the plaintiff's case by showing that although he has no title in himself, one who is not a party to the action has a title superior to that relied on by the plaintiff.

When this case was last before this Court the judgment of nonsuit theretofore entered in the Circuit Court was set aside. It was held that the deed of trust created an active trust; that the legal title to the land remained in the trustee and had not been executed by the statute of uses; and that the writ-

ten consent and confirmation of the lease from the trustee to Gear, given by the defendant, operated as a waiver of his right to occupy and use the land pursuant to the provisions of the deed of trust. Upon the resumption of the trial in the Circuit Court the defendant introduced in evidence, over the objection of the plaintiff, a [315] warranty deed dated January 1, 1906, executed by the defendant, purporting to convey to John K. Sumner "all my one-half undivided share or interest" in the land of Mokapu, and a mortgage by the defendant to Sumner of "all my undivided one-half share and interest" in Mokapu, dated January 2, 1906. This evidence was afterwards held to be inadmissible and was stricken out on the ground that it could tend to show no more than that possibly there was a title in a stranger. The ruling was correct. Another point made by the defendant is that by reason of a certain admission made at the trial by counsel for the plaintiff the plaintiff could not recover, in any event, more than an undivided one-fourth of the premises. The record shows that the plaintiff's counsel said "We admit that Robert Wyllie Davis took a half of our term of years, 25 term of years." The statement, if correctly reported, was not happily phrased, but what counsel meant evidently was that the plaintiff admitted that the defendant owned a half interest in the term demised to Gear. That must have been the understanding of the trial Court, and, we are satisfied, that was the proper view to be taken of it. The Circuit Court held that the defendant had

not rebutted the *prima facie* case previously made by the plaintiff, and judgment was entered declaring and confirming the plaintiff's ownership and right to possession of an undivided one-half interest in the land in question for a term of years, to wit, until June 1, 1935.

Counsel for the defendant (now plaintiff in error) contend that the lease from Holt, trustee, to Gear was a nullity and passed no interest in the land because, (1) the Sumner trust deed created a mere passive trust which, by the statute of uses, vested the legal title in the beneficiary, and (2) because, even if the trust was an active one, the defendant's equitable interest was assignable, both as to the rents and profits of the land and as [316] to the right of residence and use, which said interest the defendant had conveyed by deed and mortgage to Sumner, as above stated, prior to the execution of the Gear lease, and Sumner had entered into possession of the land under one or both of those instruments. There was a question as to whether or not the evidence showed that Sumner was still in possession on the date of the lease to Gear, but in the view we take of the matter that would be immaterial. We are satisfied that the ruling heretofore made by this Court that the trust deed from Sumner to Cartwright created an active trust was correct for the reasons stated in the former opinion. The trust deed did not expressly prohibit the assignment by Davis of his right to the rents. It seems to be conceded, and we may assume, that he could make a valid assignment of the rents and that the conveyances to Sumner were effectual



to pass to the grantee the right to receive rents collected by the trustee. *McCandless v. Castle*, 19 Haw. 515, 518. But could he assign his right to "reside upon said premises and while so residing to use the same for grazing or agricultural purposes?" The clear weight of authority in the United States is to the effect that a trust may be created under which the beneficiary may be entitled to receive an income which he cannot anticipate by assignment and which is free from the claims of creditors, and it is held that the right of alienation is not a necessary incident to an equitable interest to income or support for the life of the beneficiary. It is also held that the right of alienation of such an interest does not exist where it would be destructive of the trust and incompatible with its purposes though there be no express prohibition. 39 Cyc. 236; *Perkins v. Hays*, 3 Gray, 405, 409; *Baker v. Brown*, 146 Mass. 369, 371; *Seymour v. McAvoy*, 121 Cal. 438, 442; *Mattison v. Mattison*, 53 Ore. 254, 259; *Barnes v. Dow*, 59 Vt. 530, 543; *First Nat. Bank v. Trust Co.*, 62 S. W. (Tenn.) 392, 399; [317] *Monday v. Vance*, 51 S. W. (Tex.) 346, 349; *Roberts v. Stevens*, 84 Me. 325; *Bennett v. Bennett*, 217 Ill. 434, 442. We hold that under the deed of trust here involved the right of Davis to occupy and use the land for certain purposes was personal to Davis and did not extend to his assigns. This was the intention of the donor as we gather it from the deed. The object was to provide and secure for the defendant either a home and an opportunity to make a living out of the land, or an income, as he might elect to take. A right to assign the right of

occupancy would be incompatible with that object and we must give effect to the apparent intention of the donor in this respect even though the right to assign the income was not restricted. The defendant having waived his right to occupy the premises, the lease to Gear was valid and operative, and its validity was not affected by the conveyances made by the defendant to Sumner.

Our conclusion is that the judgment of the Circuit Court was in accordance with the law and the evidence, and it is affirmed.

R. J. O'BRIEN (E. C. PETERS, with him on the brief), for plaintiff in error.

W. B. LYMER (THOMPSON, WILDER, MILVERTON & LYMER, on the brief), for defendant in error.

A. G. M. ROBERTSON.

RALPH P. QUARLES.

C. W. ASHFORD.

[Endorsed]: No. 814. Supreme Court, Territory of Hawaii. October Term, 1914. Fred Harrison vs. Robert Wyllie Davis. Opinion. Filed March 4, 1915, at 2:24 P. M. J. A. Thompson, Clerk. [318]

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*In the Supreme Court of the Territory of Hawaii.*  
October Term, 1914.

FRED HARRISON,

Plaintiff-Defendant in Error,

vs.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error.

**Judgment.****ERROR TO CIRCUIT COURT, FIRST  
CIRCUIT.**

In the above-entitled cause, pursuant to the opinion of the above-entitled court, filed March 4, 1915,

IT IS ORDERED, ADJUDGED AND DECREED that the judgment of the Circuit Court, First Circuit, entered on the 26th day of June, 1914, be and the same is hereby affirmed.

Dated at Honolulu, T. H., this 9th day of March, 1915.

By the Court:

[Seal]

J. A. THOMPSON,  
Clerk Supreme Court.

R.

[Endorsed]: No. 814. Supreme Court of the Territory of Hawaii. Fred Harrison, Plaintiff-Defendant in Error, vs. Robert Wyllie Davis, Defendant-Plaintiff in Error. Judgment. Filed March 9, 1915, at 3:45 P. M. J. A. Thompson, Clerk. William B. Lymer, Attorney for Plaintiff-Appellee.  
[319]

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*In the Supreme Court of the Territory of Hawaii.*  
October, A. D. 1914, Term.

**ACTION TO QUIET TITLE AT LAW.**  
**ROBERT WYLLIE DAVIS,**  
Defendant-Plaintiff in Error,  
vs.  
**FRED HARRISON,**  
Plaintiff-Defendant in Error,

**Petition for Writ of Error and Supersedeas.**

To the Honorable the Supreme Court of the Territory of Hawaii:

The above-named defendant, Robert Wyllie Davis, deeming himself aggrieved by the judgment of the Honorable the Supreme Court of the Territory of Hawaii, entered and filed on or about the 7th day of April, A. D. 1915, in a cause entitled "Fred Harrison, Plaintiff (defendant in error), vs. Robert Wyllie Davis, Defendant (plaintiff in error)," numbered and docketed in said court as No. 814, comes now by E. C. Peters, Esq., his attorney, and hereby humbly petitions said Supreme Court of the Territory of Hawaii for an order allowing said Robert W. Davis to prosecute a writ of error and have the same allowed and issued from the United States Circuit Court of Appeals for the Ninth Circuit to said Supreme Court of the Territory of Hawaii, under and according to the laws of the United States in that behalf made and provided thereto, and that the transcript of the record, proceedings and documentary exhibits upon which said judgment was made, duly authenticated, may be sent to said United States Circuit [320] Court of Appeals for the Ninth Circuit, and also, that an order may be made by this Honorable Court fixing the amount of the bond which the said defendant shall give and furnish upon said writ of error, and that upon the filing of such bond, all proceedings relative to the subject matter in and of said cause, in the Supreme Court of the Territory of Hawaii and in the Circuit Court of the First



Judicial Circuit of the Territory of Hawaii, whether direct or ancillary thereto, be suspended and stayed until the determination of such writ of error by the Honorable the United States Circuit Court of Appeals for the Ninth Circuit.

And in this behalf your petitioner shows that the said judgment was rendered in an action at law, and that the amount involved exclusive of costs, exceeds the value of \$5,000.

Dated at Honolulu, T. H., this 21st day of May, A. A. 1915.

E. C. PETERS,  
Attorney for Petitioner. [321]

**Affidavit of C. E. Peters.**

City and County of Honolulu,  
Territory of Hawaii,  
United States of America,—ss.

E. C. Peters, being first duly sworn, deposes and says:

That he is the attorney for the above-named petitioner; that he has read the foregoing petition and knows its contents, and that the matters and things therein set forth are true of his own knowledge; and, further, that the amount involved in said cause, exclusive of costs, exceeds the value of \$5,000.

E. C. PETERS.

Subscribed and sworn to before me this 21st day of May. A. D. 1915.

[Seal] HILDA SMITH,  
Notary Public, 1st Judicial Circuit, Territory of  
Hawaii.

[Endorsed]: No. 814. In the Supreme Court of the Territory of Hawaii. Robert Wyllie Davis, Plaintiff in Error, vs. Fred Harrison, Defendant in Error. Petition for Writ of Error and Supersedeas. Filed May 22, 1915, at 11:29 A. M. J. A. Thompson, Clerk. E. C. Peters, Esq., Attorney for Plaintiff in Error. [322]

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*In the Supreme Court of the Territory of Hawaii.*  
October, A. D. 1914, Term.

ACTION TO QUIET TITLE AT LAW.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error,

vs.

FRED HARRISON,

Plaintiff-Defendant in Error.

**Assignment of Errors.**

And now comes Robert Wyllie Davis, the defendant and plaintiff in error in the above-entitled cause, by E. C. Peters, Esq., his attorney, and says that in the record and proceedings in the above-entitled cause in the Supreme Court of the Territory of Hawaii there is manifest error, to the prejudice of said defendant in error, in this, to wit:

1. That the Supreme Court of the Territory of Hawaii erred in its judgment affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, for the reason that said judgment was contrary to the evidence and the law.

2. That the Supreme Court of the Territory of Hawaii erred in not reversing the judgment of the

Circuit Court of the First Judicial Circuit of the Territory of Hawaii as contrary to the law and the evidence, and ordering that said First Circuit Court vacate and set aside the judgment theretofore entered in favor of plaintiff and enter a judgment in [323] favor of defendant in said cause.

3. That the said Supreme Court, in considering the errors assigned upon a writ of error issued at the instance of this plaintiff in error from said Supreme Court to the Circuit Court of the First Judicial Circuit of the Territory of Hawaii to correct certain rulings of said First Circuit Court in and upon the trial of said cause, erred in holding and deciding that no error had been committed by the trial court as alleged in the following first assignment of error:

1. That the trial Court erred in admitting over the objection of defendant the consolidated certified copies of the lease dated June 1, 1910, from John D. Holt, Trustee, to A. V. Gear, of the land of "Mokapu" described in the trust deed from John K. Sumner to Bruce Cartwright, Trustee, dated August 16, 1892, and on August 17, 1892, recorder in the office of the Registrar of Conveyances of the Territory of Hawaii in liber 136, at pages 136-137), of the undated consent thereto by Robert Wyllie Davis, and of the mesne assignments thereof by said A. V. Gear to Charles F. Peterson dated October 12, 1910, from the latter to Addie B. Gear dated October 12, 1910, and from Addie B. Gear to the plaintiff Fred Harrison dated October 21, 1910. Said lease, consent and mesne assignments were recorded

in the said Registry Office on May 6, 1911, in liber 343, at pages 347 *et seq.*

The offer was objected to by defendant as incompetent, irrelevant and immaterial, and not tending to prove any of the issues in the case, and on the further ground that said Holt named as trustee was not a trustee, but a pretended or fictitious trustee, and that he had no authority in law to give such a lease.

4. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial Court as alleged in the following second assignment of error:

2. That the Court erred in sustaining the objection of plaintiff thereto and refusing to permit the question propounded by defendant to the plaintiff while a witness on his own behalf on cross-examination, whether he (said plaintiff) were the same person named as mortgagee in a purported mortgage given by A. V. Gear to one Fred Harrison [324] dated November 16, 1910, and upon which the proceedings in Equity Case No. 1814 were predicated.

Plaintiff's objection was that it was not proper cross-examination.

5. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following third assignment of error:

3. That the Court erred in sustaining the objection of plaintiff thereto and refusing to permit the question propounded by defendant to



plaintiff on cross-examination concerning his, said plaintiff's identity with the mortgagee named in a certain chattel mortgage from Addie B. Gear to one Fred Harrison dated June 9, 1911, connected with the certain foreclosure proceedings brought by the said Fred Harrison against A. V. Gear and Addie B. Gear, his wife, No. 1814 Equity Division, and recorded in liber 351, at page 121, the said question being as follows:

Q. I want to call your attention to another document connected with this equity case 1814, dated the 9th day of June, 1911, and recorded in liber 351, page 121, between A. V. Gear and wife and Fred Harrison named in that particular document.

Plaintiff's objection to the question was that it was not proper cross-examination.

6. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial Court as alleged in the following fourth assignment of error:

4. That the Court erred in sustaining the objection of plaintiff to and refusing to permit the question propounded by defendant to plaintiff on cross-examination touching the identity of plaintiff with one Fred Harrison named as grantee in the certain deed from one Cecil Brown dated February 29, 1912, and recorded in said Registrar's Office in liber 366, at page 140.

Plaintiff objected to the question on the ground that it was not proper cross-examination.

7. That the Supreme Court of the Territory of



Hawaii erred in holding and deciding that no error had been committed by the trial Court as alleged in the following fifth assignment of error:

5. That the Court erred in permitting over the objection of defendant the question propounded to the plaintiff on redirect examination as follows: [325]

the land of "Mokapu" described in the trust deed

Q. I will ask you whether or not the notes referred to in exhibit 1, for which the security assignment was purported to be made,—whether or not those notes were paid by A. V. Gear.

The objection of defendant to the question was that it was not proper redirect examination.

8. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following sixth assignment of error:

6. That the Court erred in permitting over the objection of defendant the question propounded plaintiff on redirect examination concerning the witness's connection with the signature appended to a certain purported assignment from Addie B. Gear to the witness, dated June 6, 1913.

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in the case.

9. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error

had been committed by the trial court as alleged in the following seventh assignment of error:

7. That the Court erred in overruling defendant's objection to and admitting in evidence upon offer of plaintiff a certain purported agreement between Addie B. Gear and Fred Harrison, dated June 6, 1913.

This instrument was admitted as Plaintiff's Exhibit "C."

Defendant's objection to the offer was that it was incompetent, irrelevant and immaterial.

10. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following eighth assignment of error:

8. That the Court erred in overruling defendant's objection to and admitting in evidence upon offer of plaintiff a deed from Cecil Brown, Trustee, to Fred Harrison, dated June 9, 1913, the record in Equity Case No. 1293 and the lease from John D. Holt, Trustee, to A. V. Gear dated June 1, 1910, and an assignment of lease from A. V. Gear to Robert W. Davis dated June 16, 1910.

The defendant's objection to the offer was that it was incompetent, irrelevant and immaterial.

[326]

11. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following ninth assignment of error:

9. That the Court erred in overruling defendant's objection to and admitting in evidence upon

the offer of plaintiff an assignment of A. V. Gear to Robert W. Davis, the defendant, dated June 16, 1910, of an undivided one-half interest in and to of his lease of Mokapu.

Defendant's objection to this offer was that it was incompetent, irrelevant and immaterial and did not prove or tend to prove any of the issues in the case.

The instrument was admitted as Plaintiff's Exhibit "A."

12. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following tenth assignment of error:

10. That the Court erred in overruling defendant's motion for a nonsuit, which was upon the following grounds:

(1) That the plaintiff had failed to show, nor was there any evidence tending to show, that the plaintiff was entitled to an undivided half for a term of years until June, 1935, of the land of Mokapu, as set forth in paragraph one of the complaint.

(2) That the plaintiff had failed to show and there was no evidence, either competent or otherwise, tending to show that he had any interest in the land known as Mokapu aforesaid.

(3) That the alleged and pretended appointment of one John D. Holt, or John D. Holt, Jr., by a Judge of the Circuit Court of the First Circuit, was null and void, in this, that the Circuit

Court was without jurisdiction to make such appointment; and

(4) That it affirmatively appeared from the evidence that at the time of the execution of the alleged lease to the plaintiff, the defendant was possessed of a life estate in the land so referred to as "Mokapu," free and clear from any and all trusts.

13. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following eleventh assignment of error:

11. That the Court erred in overruling defendant's objection to and admitting in evidence upon plaintiff's offer, the record and files in Case No. 1828, Equity Division of the Circuit Court of the First Circuit. [327]

Defendant's objection to the offer was that it was incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case.

14. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twelfth assignment of error:

12. That the Court erred in overruling the objection of defendant to and permitting the following question to be propounded by plaintiff's counsel to plaintiff who had been recalled as a witness on his own behalf:

Q. I will ask you this: In this foreclosure proceeding when the time came for a sale to be made,



a commissioner's sale under order of the Court, who brought in whatever interests were foreclosed in this proceeding.

Defendant's objection was that the question was incompetent, irrelevant and immaterial.

15. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following thirteenth assignment of error:

13. That the Court erred in overruling the objection of defendant to and permitting to be propounded to plaintiff by his counsel (recalled as a witness on his own behalf) the following question:

Q. I show you Law No. 7695 of the files of this Circuit Court, Cecil Brown, Trustee, v. Robert Wyllie Davis, and will ask you if that is the suit brought at your instigation to quiet title.

Defendant's objection was that the question was immaterial.

16. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following fourteenth assignment of error:

14. That the Court erred in overruling the objection of defendant on the ground of immateriality and admitting in evidence upon the offer of plaintiff, the record and files of Law No. 7695 of the Circuit Court of the First Judicial Circuit.

17. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in



the following fifteenth assignment [328] of error:

15. That the Court erred in overruling the objection of defendant on the ground of immateriality and permitting plaintiff's counsel to propound to the plaintiff who was recalled for further examination, the following question:

Q. In this case, Mr. Harrison, the record shows that on the 27th day of June, 1913, judgment was given for the defendant upon the ground that the plaintiff had asked for a nonsuit in the case. When the nonsuit was granted, what, if anything, further did you do?

18. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following seventeenth assignment of error:

17. That the Court erred in sustaining the objection of plaintiff to and rejecting the evidence offered by defendant of a deed from Robert Wyllie Davis and wife to John K. Sumner of an undivided one-half interest in the land known as "Mokapu," dated January 1, 1906, and recorded on March 4, 1908, in liber 302, on page 192.

Plaintiff's objection was that it was incompetent, irrelevant and immaterial and defendant was estopped from introducing any such deed in evidence.

19. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following eighteenth assignment of error:

18. That the Court erred in sustaining the ob-

jection of plaintiff to and rejecting the offer of defendant of a certain mortgage from Robert Wyllie Davis and wife to John K. Sumner, dated January 2, 1906, and recorded on March 4, 1908, in the office of the Registrar of Conveyances of the Territory of Hawaii in liber 303, at page 91, whereby the said Robert W. Davis conveyed by way of mortgage to the said John K. Sumner an undivided one-half interest in and to the land of Mokapu.

Plaintiff's objection was that this evidence was incompetent, irrelevant and immaterial, and that defendant was estopped from introducing such mortgage in evidence.

20. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following nineteenth assignment of error:

19. That the Court erred in sustaining the objection of plaintiff to and refusing to permit the following question [329] propounded by defendant to the defendant Robert Wyllie Davis, while a witness on his own behalf in defense:

Q. You are named the mortgagor in a certain mortgage from yourself and wife to John K. Sumner, dated the 2d day of January, 1906, recorded in liber 303, at page 91. I will ask you whether or not you have ever paid up the amount secured by that mortgage?

Plaintiff's objection was that the question was incompetent, irrelevant and immaterial, and the defendant was estopped from introducing any such papers in evidence.

21. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twentieth assignment of error:

20. That the Court erred in overruling the objection of defendant to and permitting the following question propounded by plaintiff to A. V. Gear, called as a witness by plaintiff in rebuttal:

Q. Were you still working under the agreement with Wyllie Davis at the time you took this 25-year leasehold?

Defendant's objection was that the question was incompetent, irrelevant, and immaterial.

22. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-first assignment of error:

21. That the Court erred in denying defendant's motion to strike out the answer of the witness A. V. Gear given on direct examination on rebuttal, as follows:

A. The agreement was cancelled coextensively with the issuing of the 25-year lease. There were two agreements that I had with Mr. Davis that I was working under, and the consideration of the execution of the lease was the cancelling of the agreements,—the terms of—

The ground of defendant's motion was that it appeared that the witness was testifying in respect to two agreements, the contents of which were unknown.

23. That the Supreme Court of the Territory of

Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-second assignment of error :

22. That the Court erred in overruling the objection of defendant to the question propounded by plaintiff to the witness A. V. Gear on direct examination in rebuttal, as follows:  
[330]

Q. And these agreements you have spoken of were entered into between yourself and Mr. Davis. Were you, Mr. Gear, ever present at any conversation between Wallie Davis and Sumner when the matter of Davis' deeding over his interest to Sumner was discussed?

Defendant's objection was on the ground that there were not any agreements in evidence and the time laid was indefinite.

24. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-third assignment of error :

23. That the Court erred in overruling the defendant's objection to the following question propounded to the witness A. V. Gear, on direct examination :

Q. I will change that by saying, state what was discussed by Sumner and Davis in regard to the ownership of Mokapu.

Defendant's objection to this question was that it was irrelevant, incompetent and immaterial, not tending to prove or disprove any of the issues



of the case and calling for a conclusion of the witness.

25. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-fourth assignment of error:

24. That the Court erred in overruling the objection of defendant to and permitting plaintiff to propound the following question on direct examination of the witness A. V. Gear who had been called on rebuttal:

Q. Just answer "Yes" or "No" to this question: Did you ever know from Wallie Davis' own lips, his own statement, as to the real intent and meaning of this deed of January 1, 1906, of one-half of Mokapu to John K. Sumner, a deed absolute on its face?

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial and indefinite.

26. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-fifth assignment of error:

25. That the Court erred in overruling the objection of defendant to and permitting plaintiff to propound the following question to the witness Gear on direct examination while called in rebuttal:

Q. Will you state what that statement was?  
[331]

Defendant's objection to the question was that

it was incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in the case.

27. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-sixth assignment of error:

26. That the Court erred in overruling the objection of defendant to and permitting plaintiff to propound to the witness Gear on cross-examination when called in rebuttal, the following question:

Q. Let me ask you, Mr. Gere, did Mr. Davis at this interview you have spoken of when he spoke of giving Mokapu as security, did he mention anything about the amount of the advances which he had secured?

Defendant's objection to the question was that it was incompetent, irrelevant and immaterial.

28. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial Court as alleged in the following twenty-seventh assignment of error:

27. That the Court erred in overruling the objection of defendant to and permitting the plaintiff to propound to the witness Gear on direct examination on rebuttal, the following question:

Q. There is on record here in evidence, Mr. Gere, a sublease, or, rather, an assignment by you of one-half of your interest in and to this 25-year term to Wallie Davis after you took the

assignment. I want to ask you whether or not the matter of that assignment of this one-half interest was ever discussed between yourself and Mr. Davis and Mr. Sumner, prior to the time when the 25-year term was created in 1910?

Defendant's objection was that the question was incompetent, irrelevant and immaterial.

29. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-eighth assignment of error:

28. That the Court erred in granting over the objection of defendant plaintiff's motion to amend the prayer of his complaint to read as follows:

"Wherefore, plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, term thereof, unless sooner disposed of by judicial authority; that the defendant may be required to set up in the [332] traverse any claim he may have in and to the undivided half of said term of years in said land; that defendant be forever barred from any claim to and of interest in said described undivided half of said term of years and that said undivided half of said term of years may be quieted and that the plaintiff's ownership therein may be confirmed and the plaintiff herein awarded his costs herein."

Defendant's objection was that the motion was made too late.

30. That the Supreme Court of the Territory of

Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following twenty-ninth assignment of error:

29. That the Court erred in finding for the plaintiff for an undivided half of the term of years set out in the complaint, said finding being against the law and the evidence and the weight of the evidence.

31. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following thirtieth assignment of error:

30. That the Court erred in not finding and deciding that the plaintiff was not entitled to any interest whatsoever in the land known as Mokapu.

32. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following thirty-first assignment of error:

31. That the Court erred in entering its judgment herein adjudging that the plaintiff was the owner and entitled to the immediate possession of an undivided one-half for a term of years, to wit, until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, city and county of Honolulu, Territory of Hawaii, known as the land of Mokapu, and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the Registrar of Conveyances in said Honolulu in liber 343, at pages 347-351,



upon the ground that said judgment is contrary to the law and the evidence and the weight of the evidence.

33. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed [333] by the trial court as alleged in the following thirty-second assignment of error:

32. That the Court erred in adjudging that the plaintiff was entitled to any interest in the land known as Mokapu.

34. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following thirty-third assignment of error:

33. That the Court erred in not entering its judgment herein that plaintiff take nothing by his said action.

WHEREFORE, plaintiff in error prays that the judgment of said Supreme Court be reversed, and that the Supreme Court of the Territory of Hawaii be ordered to enter an order reversing the judgment of said First Circuit Court and ordering said First Circuit Court to enter judgment for defendant in said cause.

Dated this 21st day of May, A. D. 1915.

E. C. PETERS,

Attorney for Defendant in Error, Robert Wyllie Davis.

[Endorsed]: No. 814. In the Supreme Court of the Territory of Hawaii. Robert Wyllie Davis, Plaintiff in Error, vs. Fred Harrison, Defendant in

Error. Assignment of Errors. Filed May 22, 1915,  
at 11:29 A. M. J. A. Thompson, Clerk. E. C.  
Peters, Esq., Attorney for Plaintiff in Error. [334]

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*In the Supreme Court of the Territory of Hawaii.*  
October, A. D. 1914, Term.

(Stamps)

**ACTION TO QUIET TITLE AT LAW.**

**ROBERT WYLLIE DAVIS,**

Defendant-Plaintiff in Error,

vs.

**FRED HARRISON,**

Plaintiff-Defendant in Error.

**Supersedeas and Cost Bond on Writ of Error.**

**KNOW ALL MEN BY THESE PRESENTS:**

That we, Robert Wyllie Davis, of Koolaupoko, city and county of Honolulu, Territory of Hawaii, as principal, and Eugene D. Buffandeau, Charles H. Rose and George M. Yamada, all of Honolulu, city and county of Honolulu, Territory of Hawaii, as sureties, are jointly and severally held firmly bound unto Fred Harrison in the full and just sum of \$500, to the payment whereof well and truly to be made unto the said Fred Harrison, his administrators, executors or assigns, we hereby bind ourselves, our and each of our respective heirs, executors and administrators, jointly and severally, firmly by these presents.

**THE CONDITION OF THIS OBLIGATION IS AS FOLLOWS:**

WHEREAS, in the above-entitled cause, a petition

has been filed for the allowance of a writ of error to have the judgment of said Supreme Court of the Territory of Hawaii, entered and filed in the above-entitled cause on or about the 7th day of April, A. D. 1915, and the proceedings in said cause prior thereto, reviewed by the United States [335] Circuit Court of Appeals for the Ninth Circuit, and to have issued a supersedeas herein;

NOW, THEREFORE, if such writ of error and supersedeas shall issue according to the prayer of the petition in that behalf, and if the said Robert Wyllie Davis, the above-bounden principal, shall prosecute said writ of error to effect and answer all damages and costs, if he fails to make good his plea, then the above obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ROBERT WYLLIE DAVIS, (Seal)

Principal.

E. BUFFANDEAU, (Seal)

Surety.

CHARLES H. ROSE,

Surety.

GEO. M. YAMADA, (Seal)

Surety.

### **Certificate of Clerk.**

United States of America,  
Territory of Hawaii,—ss.

I, J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that Eugene D. Buffandeau and George M. Yamada, parties to this bond whose genuine signatures appear subscribed to the above bond, are in my opinion good

and ample security for the amount therein specified, and that they have property in said Territory of Hawaii subject to execution in excess of the amount of said bond, and that if the bond was presented to me for approval the same would be accepted and approved.

WITNESS my hand this 21st day of May, A. D. 1915. [336]

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Clerk of the Supreme Court of the Territory of Hawaii.

The foregoing bond is approved as to form and sufficiency, this 22d day of May, A. D. 1915.

[Seal] A. G. M. ROBERTSON,  
Chief Justice of the Supreme Court of the Territory of Hawaii.

Approved as to form and sufficiency.

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Attorney for Plaintiff.

[Endorsed]: No. 814. In the Supreme Court of the Territory of Hawaii. Robert Wyllie Davis, Plaintiff in Error, vs. Fred Harrison, Defendant in Error. Supersedeas and Cost Bond on Writ of Error. Filed May 22, 1915, at 11:29 A. M. J. A. Thompson, Clerk. E. C. Peters, Esq., Attorney for Plaintiff in Error. Received at 10:30 A. M., May 27, A. D. 1915. —————, Deputy High Sheriff. [337]



*In the Supreme Court of the Territory of Hawaii.*

October, A. D. 1914, Term.

**ACTION TO QUIET TITLE AT LAW.**

**ROBERT WYLLIE DAVIS,**

Defendant-Plaintiff in Error,

vs.

**FRED HARRISON,**

Plaintiff-Defendant in Error.

**Order Allowing Writ of Error and Supersedeas.**

Upon reading and filing the foregoing petition for a writ of error, together with an assignment of errors presented therewith, alleged to have occurred in the judgment of this court and in the proceedings in the trial of said cause prior thereto, IT IS ORDERED that a writ of error be and the same is hereby allowed to the said Robert W. Davis to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered in the above-entitled cause and the proceedings in the trial of said cause prior thereto, and that the amount of the bond to be filed in this court by the said Robert W. Davis in connection with the writ of error prayed for, be and the same is hereby fixed in the sum of \$500.00; and IT IS FURTHER ORDERED that upon the filing of an approved bond in said amount, all further proceedings in said Supreme Court of the Territory of Hawaii, and in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, in and of said cause, and whether direct or ancillary thereto, shall be suspended and

stayed until the determination of such writ of error to the United [338] States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, T. H. this 22d day of May, A. D. 1915.

[Seal]

A. G. M. ROBERTSON,  
Chief Justice of the Supreme Court of the Territory  
of Hawaii.

Served the within Supersedeas and cost bond on writ of error, Certificate of Clerk, Writ of Error, Petition for Writ of Error and Supersedeas, Affidavit of E. C. Peters, Assignment of Errors, Order Allowing Writ of Error and Supersedeas and Citation in Error, on Fred Harrison, therein named as plaintiff-defendant in error, at Honolulu, city and county of Honolulu, Territory of Hawaii, this 27th day of May, A. D. 1915, by delivering to him a certified copy of the within Supersedeas and Cost Bond on Writ of Error, Certificate of Clerk, Writ of Error, Petition for Writ of Error and Supersedeas, Affidavit of E. C. Peters, Assignment of Errors, Order Allowing Writ of Error and Supersedeas and Citation in Error, and at the same time showing him the original.

Dated at Honolulu, city and county of Honolulu, Territory of Hawaii, this 27th day of May, A. D. 1915.

PATRICK GLEASON,  
Deputy High Sheriff, Territory of Hawaii.

[Endorsed]: No. 814. In the Supreme Court of the Territory of Hawaii. Robert Wyllie Davis,

Plaintiff in Error, vs. Fred Harrison, Defendant in Error. Order Allowing Writ of Error and Superseas. Filed May 22, 1915, at 11:29 A. M. J. A. Thompson, Clerk. E. C. Peters, Esq., Attorney for Plaintiff in Error. [339]

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*In the Supreme Court of the Territory of Hawaii.*

October, A. D. 1914, Term.

ACTION TO QUIET TITLE AT LAW.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error,

vs.

FRED HARRISON,

Plaintiff-Defendant in Error.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America: To the Honorable the Chief Justice of the Supreme Court of the Territory of Hawaii, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of the Territory of Hawaii before you, or some of you, between Fred Harrison, plaintiff (defendant in error), and Robert W. Davis, defendant (plaintiff in error), a manifest error hath happened, to the damage of the said Robert Wyllie Davis, as by said complaint in said court appears; and we being willing that such error if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf,

do command you if judgment be therein given, that then under your seal you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals of the Ninth Circuit at the courtrooms of said court in the [340] city of San Francisco, State of California, together with this writ, so that you have the same at the said place where said court is sitting, within thirty (30) days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the error, what of right and according to the laws and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the J. A. T. 22d day of May, in the year of our Lord One Thousand *Nineteen* Fifteen, and of the Independence of the United States the One Hundred Fortieth.

J. A. THOMPSON,  
Clerk of the Supreme Court of the Territory of Hawaii.

The foregoing writ is hereby allowed.

Dated May 22d, 1915.

[Seal] A. G. M. ROBERTSON,  
Chief Justice of the Supreme Court of the Territory of Hawaii. [341]

[Endorsed]: No. 814. In the Supreme Court of the Territory of Hawaii. Robert Wyllie Davis,



Plaintiff in Error, vs. Fred Harrison, Defendant in Error. Writ of Error. Filed May 22, 1915, at 11:29 A. M. J. A. Thompson, Clerk. [342]

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*In the Supreme Court of the Territory of Hawaii.*  
October, A. D. 1914, Term.

**ACTION TO QUIET TITLE AT LAW.**

**ROBERT WYLLIE DAVIS,**

Defendant-Plaintiff in Error,

vs.

**FRED HARRISON,**

Plaintiff-Defendant in Error.

**Citation [on Writ of Error].**

The United States of America,—ss.

To Fred Harrison, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty (30) days after the date of this citation pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Robert Wyllie Davis is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the

United States, this 22d day of May, A. D. 1915.

[Seal]

A. G. M. ROBERTSON,

Chief Justice of the Supreme Court of the Territory  
of Hawaii. [343]

Due and proper service of the above citation and  
receipt of a true copy hereof is hereby admitted this  
21st day of May, A. D. 1915.

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Attorney for Fred Harrison. [344]

[Endorsed]: No. 814. In the Supreme Court of  
the Territory of Hawaii. Robert Wyllie Davis,  
Plaintiff in Error, vs. Fred Harrison, Defendant in  
Error. Citation in Error. Filed and issued May  
22, 1915, at 11:29 A. M. J. A. Thompson, Clerk.  
Returned May 28, 1915, at 1:30 P. M. J. A. Thomp-  
son, Clerk. Received at 10:30 A. M., May 27, A. D.  
1915. P. Gleason, Deputy. E. [345]

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*In the Supreme Court of the Territory of Hawaii.*

**ACTION TO QUIET TITLE AT LAW.**

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error,

vs.

FRED HARRISON,

Plaintiff-Defendant in Error.

**Order Extending Time for Preparation and  
Transmission of Record.**

Upon the application of counsel for plaintiff in  
error, and good cause appearing therefor, and pur-  
suant to section 1 of Rule 16 of the United States Cir-



**Praeceptum for Transcript.**

To James A. Thompson, Esquire, Clerk of the Supreme Court of the Territory of Hawaii:

YOU WILL PLEASE prepare a transcript of the record in this cause (said cause being entitled in the Supreme Court of the Territory of Hawaii, "Fred Harrison, Plaintiff-Defendant in Error, vs. Robert Wylie Davis, Defendant-Plaintiff in Error,") to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the writ of error heretofore issued by said court and include in said transcript the following pleadings, exhibits, proceedings, opinions, judgments and papers on file in said cause, to wit:

1. Petition for Writ of Error to the Circuit Court of the First Judicial Circuit, Territory of Hawaii, dated November 11, 1914;
2. Assignment of Errors, dated November 11, 1914;
3. Notice that Writ of Error has issued, dated November 11, 1914;
4. Summons, dated November 11, 1914, with return of service appended thereto;
5. Bond on Writ of Error, dated November 11, 1914;
6. Writ of Error, dated November 11, 1914;
7. Appearance of counsel for defendant in error, dated November 11, 1914;
8. Bill of Complaint, dated June 12, 1913, and attached thereto as exhibit "A" thereof is a lease dated June 1, 1910, between John D.



Holt, Trustee, and A. V. Gear, and the consent and confirmation of lease by Robert Wyllie Davis; [348]

9. Term Summons dated June 12, 1913, with return of service annexed thereto;
10. Answer of defendant and demand for trial by jury filed July 1, 1913;
11. Answer of defendant and demand for trial by jury filed July 2, 1913;
12. Statement of Facts, dated October 21, 1913;
13. Motion to reopen plaintiff's case for further evidence, dated November 15, 1913, and notice of motion;
14. Decision of Hon. W. L. Whitney on defendant's motion for nonsuit, filed December 22, 1913;
15. Exception by plaintiff to decision on defendant's motion for nonsuit, filed December 23, 1913;
16. Judgment on defendant's motion for nonsuit, dated January 2, 1914;
17. Exception by plaintiff to judgment on defendant's motion for nonsuit, dated January 2, 1914;
18. Opinion of the Supreme Court of Hawaii, rendered March 6, 1914 (on the first trial), (Number 757);
19. Notice of decision on exceptions dated March 7, 1914;
20. Decision of Hon. W. L. Whitney, dated June 25, 1914;
21. Judgment of the Circuit Court, First Circuit, entered June 26, 1914;

22. Exception by defendant to decision, dated June 30, 1914;
23. Exception by defendant to judgment, dated June 30, 1914;
24. Clerk's Minutes of the Circuit Court, First Circuit;
25. Defendant's Bill of Exceptions, dated September 14, 1914, with order allowing same, dated November 6, 1914;
26. Transcript of testimony on the first trial, filed January 13, 1914;
27. Transcript of testimony on the second trial, filed August 4, 1914;
28. Plaintiff's Exhibit "A," lease between John K. Sumner by Trustee and A. V. Gear, dated June 1, 1910, following which are the following, viz.: (1) consent and confirmation of lease by Robert Wyllie Davis; (2) assignment of lease by A. V. Gear to C. A. Peterson, dated October 12, 1910; (3) assignment of lease by C. A. Peterson to Addie B. Gear, dated October 12, 1910; and (4) assignment of lease by Addie B. Gear to Fred Harrison, dated October 21, 1910;
29. Plaintiff's Exhibit "C," assignment of lease, dated June 6, 1913, Addie B. Gear to Fred Harrison; [349]
30. Plaintiff's Exhibit "D," quitclaim deed, dated June 9, 1913, Cecil Brown, trustee, to Fred Harrison;
31. Plaintiff's Exhibit "E," assignment of lease,

dated June 16, 1910, A. V. Gear to Robert Wyllie Davis;

32. Defendant's Exhibit "1," assignment of lease, dated October 24, 1910, Fred Harrison to Addie B. Gear;
33. Defendant's Exhibit "2," assignment of lease, dated November 16, 1910, A. V. Gear to Fred Harrison;
34. Equity Record Number 1293, entitled in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, "In the Matter of the Trust Deed of John K. Sumner," said record consisting of the following, to wit:
  - (1) Petition of *cestui que trust* to appoint a new trustee, dated August 25, 1902;
  - (2) Resignation of Bruce Cartwright as Trustee, dated August 22, 1902;
  - (3) Order appointing new trustee, dated August 29, 1902, and
  - (4) Trust Deed, dated August 16, 1892, John K. Sumner to Bruce Cartwright;
35. Equity Record Number 1814, entitled in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, "Fred Harrison vs. A. V. Gear and Addie B. Gear, His Wife," said record consisting of the following, to wit:
  - (1) Bill of complaint, dated January 20, 1912, and attached thereto as parts thereof, are the following:

- (a) Lease dated June 1, 1910, between John D. Holt, trustee and A. V. Gear, following which are the following: (1) consent and confirmation of lease by Robert Wyllie Davis; (2) assignment of lease by A. V. Gear to C. A. Peterson, dated October 12, 1910; (3) assignment of lease by C. A. Peterson to Addie B. Gear, dated October 12, 1910; and (4) assignment of lease by Addie B. Gear to Fred Harrison, dated October 21, 1910;
- (b) Assignment of lease dated November 16, 1910, A. V. Gear to Fred Harrison, and
- (c) Agreement between A. V. Gear and Addie B. Gear, his wife, and Fred Harrison, dated June 9, 1911;
- (2) Chambers Summons, dated January 20, 1912, with return of service;
- (3) Answer of A. V. Gear, defendant, January 29, 1912;
- (4) Answer of Addie B. Gear, defendant, dated January 29, 1912;
- (5) Special appearance and motion to quash summons and service dated



February 1, 1912, and notice of motion;

- (6) Motion for decree of foreclosure, dated February 5, 1912, and decree of foreclosure entered February 6, 1912;
- (7) Commissioner's Return and Account of Sale, filed February 27, 1912, and attached thereto as parts thereof are the following:
  - (a) Affidavit of publication of notice of sale;
  - (b) Notice of sale;
  - (c) Receipt of W. T. Rawlins for \$185;
  - (d) Receipt of Job Batchelor, Commissioner, for \$75;
  - (e) Receipt of the Hawaiian Star Newspaper Association for \$38.95;
  - (f) Bill of James F. Morgan, Auctioneer, for \$50; and
  - (g) Statement of costs amounting to \$22;
- (8) Order confirming sale, dated February 28, 1912, and
- (9) Writ of Possession, dated April 24, 1912, with return of service by Wm. Henry, High Sheriff, Territory of Hawaii. [350]

36. Equity Record Number 1828, entitled in the Circuit Court of the First Judicial Circuit,

Territory of Hawaii, "Cecil Brown, Trustee, v. Robert Wyllie Davis," said record consisting of the following, to wit:

- (1) Bill of complaint, dated May 27, 1912, and attached thereto as Exhibit "A" thereof, is lease, dated June 1, 1910, between John D. Holt, Trustee, and A. V. Gear, following which are the following: (1) consent and confirmation of lease by Robert Wyllie Davis; (2) assignment of lease by A. V. Gear to C. A. Peterson, dated October 12, 1910; (3) assignment of lease by C. A. Peterson to Addie B. Gear, dated October 12, 1910; and (4) assignment of lease by Addie B. Gear to Fred Harrison, dated October 21, 1910;
- (2) Chambers Summons, dated May 27, 1912, with return of service attached thereto;
- (3) Stipulation that respondent have to and including June 15, 1912, within which to appear, plead, demur to or answer the bill of complaint, dated June 21, 1912;
- (4) Stipulation that respondent have to and including June 20, 1912, within which to appear, plead, demur to or answer the bill of complaint, dated June 15, 1912;

- (5) Motion by plaintiff for judgment and decree *pro confesso* dated June 21, 1912, and attached thereto are the affidavits of F. E. Thompson and Henry Smith;
  - (6) Decree entered June 21, 1912;
  - (7) Demurrer of respondent, dated June 21, 1912;
  - (8) Joinder in demurrer, dated June 26, 1912;
  - (9) Answer of defendant, filed July 24, 1912;
  - (10) Replication of Cecil Brown, Trustee, to answer of respondent, filed July 26, 1912;
  - (11) Motion by plaintiff to set case for trial, dated July 26, 1912, and notice of motion;
  - (12) Decision of Hon. W. L. Whitney on motion to set case for trial, filed August 14, 1912;
  - (13) Appeal and notice of appeal by plaintiff, dated August 14, 1912;
  - (14) Notice of decision on appeal from the Supreme Court, filed October 25, 1912; and
  - (15) Discontinuance filed March 27, 1915.
37. Law Record Number 7695 entitled in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, "Cecil Brown, Trustee, vs. Robert Wyllie Davis," said record consisting of the following:

- (1) Complaint, dated January 15, 1913, and attached thereto as Exhibit "A" thereof is lease dated June 1, 1910, between John D. Holt, Trustee, and A. V. Gear, following which, is the consent and confirmation of the lease by Robert Wyllie Davis;
- (2) Term summons, dated January 15, 1913, with return of service appended thereto;
- (3) Answer of defendant, dated February 7, 1913;
- (4) Demand by defendant for jury trial, dated February 7, 1913;
- (5) Motion by plaintiff to set case for trial and notice of motion, dated April 4, 1913;
- (6) Defendant's cost bill and notice of time for taxation of costs;
- (7) Decision dated June 25, 1913; and
- (8) Judgment entered June 27, 1913;
38. Opinion of the Supreme Court of Hawaii, rendered March 4, 1915;
39. Judgment of the Supreme Court of Hawaii, entered March 9, 1915; [351]
40. Petition for Writ of Error and Supersedeas to the Supreme Court of Hawaii, dated May 22, 1915, and appended thereto is the affidavit of E. C. Peters;
41. Assignment of Errors, dated May 22, 1915;



42. Supersedeas and cost bond on writ of error, filed May 22, 1915;
43. Order allowing writ of error and supersedeas, filed May 22, 1915, with return of service.

You will annex to and transmit with the record the original writ of error and citation with return of service, your return to the writ of error under the seal of the Supreme Court of the Territory of Hawaii and also your certificate under seal stating in detail the cost of the record and by whom the same was paid.

Dated at Honolulu, T. H., July 21st, A. D. 1915.

Respectfully,

E. C. PETERS,

Attorney for Plaintiff in Error.

City and County of Honolulu,  
Territory of Hawaii,—ss.

I, E. C. Peters, hereby certify that on, to wit, the 21st day of July, A. D. 1915, I served the foregoing praecipe upon W. D. Lymer, Esq., attorney for defendant in error, by depositing a full, true and correct copy thereof enclosed in an envelope in the U. S. Postoffice addressed to him at Honolulu, postpaid, in time to be delivered to him by the ordinary course of mail on July 22d, 1915.

E. C. PETERS.

[Endorsed]: No. 814. In the Supreme Court of the Territory of Hawaii. Robert Wyllie Davis, Plaintiff in Error, vs. Fred Harrison, Defendant in Error. Praecipe for Transcript. Filed July 22, 1915, at 8:30 A. M. J. A. Thompson, Clerk. E. C. Peters, Esq., Attorney for Plaintiff in Error. [352]

*In the Supreme Court of the Territory of Hawaii.*  
October Term, 1914.

ROBERT WYLLIE DAVIS,

Defendant-Plaintiff in Error,

vs.

FRED HARRISON,

Plaintiff-Defendant in Error.

**Certificate of Clerk to Transcript of Record and  
Return to Writ of Error.**

Territory of Hawaii,

City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the within Writ of Error, the original whereof is herewith returned, being pages 340 to 342, both inclusive, of the foregoing transcript, and in pursuance to the praecipe to me directed, a copy whereof is hereto attached, being pages 348 to 352, both inclusive, DO HEREBY transmit to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 339, both inclusive, and I certify the same to be full, true and correct copies of the pleadings, record, entries, exhibits and final judgment which are on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii in the case entitled in said Court “Fred Harrison, plaintiff and defendant in error, vs. Robert Wyllie Davis, defendant and plaintiff in error, and Numbered 757 and 814. [353]

I do further certify that the Original Citation on Writ of Error, being pages 343 to 345, both inclusive, and the Original Order Extending Time for Preparation and Transmission of Record, being pages 346 to 347, both inclusive, of the foregoing transcript of record are hereto attached and herewith returned.

I lastly certify that the cost of the foregoing transcript of record is \$125.80, and that said amount has been paid by E. C. Peters, the attorney for the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, city and county of Honolulu, this 26th day of July, A. D. 1915.

[Seal]                      JAMES A. THOMPSON,  
Clerk Supreme Court of the Territory of Hawaii.

[354]

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[Endorsed]: No. 2633. United States Circuit Court of Appeals for the Ninth Circuit. Robert Wyllie Davis, Plaintiff in Error, vs. Fred Harrison, Defendant in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed August 4, 1915.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

No. 2633

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**United States Circuit Court of Appeals**  
**FOR THE**  
**NINTH CIRCUIT**

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**ROBERT WYLLIE DAVIS,**  
Defendant, Plaintiff in Error,  
  
vs.

**FRED HARRISON,**  
Plaintiff, Defendant in Error.

---

In Error to the Supreme Court of Hawaii.

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**BRIEF FOR PLAINTIFF IN ERROR**

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**E. C. PETERS and R. J. O'BRIEN,**  
Attorneys for Plaintiff in Error.

Filed this        day of        , A. D. 1916.  
F. D. MONCKTON, Clerk.

By.....  
Deputy Clerk.

**Filed**  
APR 10 1916  
F. D. Monckton,  
Clerk.





# United States Circuit Court of Appeals for the Ninth Circuit

No. 2633

ROBERT WYLLIE DAVIS, Defendant, Plaintiff in Error, vs. FRED HARRISON, Plaintiff, Defendant in Error.	} In Error to the SUPREME COURT OF HAWAII
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## BRIEF FOR PLAINTIFF IN ERROR

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### PRELIMINARY STATEMENT.

This is a writ of error to the Supreme Court of the Territory of Hawaii, to review a judgment of that court in favor of Fred Harrison, in an action brought by him against Robert Wyllie Davis, for the purpose of having the title to certain land adjudicated and quieted.

### STATEMENT OF FACTS.

On the 12th day of June, 1913, the defendant in error filed an action in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, alleging as follows:

“That the plaintiff is entitled to an undivided one-half interest for a term of years, to wit, until June 1, 1935, in all that certain piece or parcel of land situated at Koolaupoko, City and County of Honolulu, Territory of Hawaii, aforesaid, known as the land of Mokapu, and described in that certain lease from John D. Holt, Trustee, to A. V. Gear, dated January 1, 1910, and recorded in the office of the Registrar of Conveyances, in book 343, at pages 346 to 351, a copy of which lease is hereto attached and made a part hereof marked Exhibit ‘A.’

“That defendant claims said undivided one-half of said land adversely to plaintiff, and plaintiff is desirous of having the title thereto adjudicated and quieted.

“That the defendant is a necessary party to the complete determination and settlement of the question of title involved herein.

“*Wherefore*, plaintiff prays that defendant be summoned to appear and answer this complaint at the January, 1913, Term hereof, unless sooner disposed of by judicial authority; that the defendant may be required to set up any adverse claim which he may have in and to said lands, and for costs.”

The plaintiff in error filed a general denial to defendant in error’s complaint, and upon issue had in said cause, judgment was rendered on the 26th day of June, 1914, in favor of the defendant in error.

At the trial of said cause, the defendant in error introduced evidence showing the following facts:

That on August 16, 1892, John K. Sumner conveyed the land in question, which consisted of 432 acres, to Bruce Cartwright, in trust, “in the first place to pay the rents, issues and profits arising therefrom and thereout so long as the lease now in existence is in force” to the grantor, “and upon the

expiration of the present lease, or other sooner determination thereof, to pay the rents, issues and profits arising from and out of said lands," to the grantor's nephew, Robert Wyllie Davis, the present plaintiff in error, "during the term of his natural life, or in the discretion of the said Robert Wyllie Davis, to permit him to reside upon said premises and while so residing to use the same for grazing and agricultural purposes, and in the second place, from and after the death of the said Robert Wyllie Davis, to convey the said premises to the heirs of the body of the said Robert Wyllie Davis, and failing said heirs, then to the wife of the said Robert Wyllie Davis, and failing said wife, then to convey the said premises unto the heirs at law of the said Robert Wyllie Davis share and share alike."

That Cartwright resigned as trustee, and that John D. Holt was, on August 29, 1902, appointed as his successor by a court of equity; that on June 1, 1910, Holt as trustee, executed a lease of the property to A. V. Gear for twenty-five (25) years from June 1, 1910; that on August 4, 1910, plaintiff in error signed and acknowledged the following statement relating to the lease just mentioned:

"Know all men by these presents, that I, Robert Wyllie Davis, of Mokapu, Koolaupoko, Island of Oahu, and I, Mary Kealohanui Davis, wife of Robert Wyllie Davis, do each of us give our consent to the foregoing lease, ratifying and confirming the same on behalf of any interest we have or which may hereafter accrue to either of us in the future under the terms of the aforesaid deed of trust."



That on June 16, 1910, A. V. Gear executed an assignment to plaintiff in error of an undivided one-half interest in the Holt lease and in the term thereby demised, the instrument of assignment not appearing, however, to have been signed by the plaintiff in error.

A. V. Gear's remaining undivided one-half in the land and in the demised premises passed by successive assignments to C. A. Peterson and Addie B. Gear, and finally, on October 21, 1910, to the defendant in error.

At the conclusion of the defendant in error's case, the plaintiff in error moved for a non suit upon the grounds, among others, (a) that the evidence of the defendant in error showed affirmatively that there was a lease outstanding when the lease to Gear, under which defendant in error claims, was made by Holt, trustee; (b) that defendant in error had failed to deraign his title from the government; and (c) that the statute of uses had executed the trust and that the defendant was the owner of a life interest in the property and that therefore the lease from Holt, trustee, was invalid.

The motion for a non suit was granted on the first and second grounds. The defendant in error appealed to the Supreme Court of the Territory from the court's order granting plaintiff in error's motion, which judgment was reversed.

Upon the resumption of the trial in the Circuit Court, the plaintiff in error introduced in evidence,

over the objection of the defendant in error, a warranty deed duly recorded dated January 1, 1906, executed by the plaintiff in error, purporting to convey to John K. Sumner "all my one-half undivided share and interest" in the land of Mokapu, and a mortgage by the plaintiff in error to Sumner of "all my undivided one-half share and interest" in Mokapu, dated January 2, 1906. The mortgage was also duly recorded and acknowledged.

The court below held the evidence sought to be introduced by the plaintiff was inadmissible.

After counsel for the defendant in error admitted that plaintiff in error was entitled at the time the within action was commenced, to an undivided one-half interest in the term granted June 1, 1910, the plaintiff in error rested.

The court below held that the defendant had not rebutted the *prima facie* case previously made by the defendant in error, and entered the following judgment:

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiff is the owner and entitled to an immediate possession of an undivided one-half interest for a term of years until June 1, 1935, in all of that certain piece or parcel of land situated at Koolaupoko, City and County of Honolulu, Territory of Hawaii, aforesaid, known as the land of Mokapu, and described in that certain lease from Holt, trustee, dated June 1, 1910, and recorded in the office of the Registrar of Conveyances, in book 343, at pages 346 to 351;

"That plaintiff's title and ownership in said land

for said term of years is quieted and confirmed accordingly;

“And that the plaintiff is entitled to have and recover against defendant his costs in this action taxed in the sum of forty-one and 75/100 (\$41.75) dollars.”

Upon the rendition of the above judgment the plaintiff in error appealed to the Supreme Court of the Territory of Hawaii, and upon March 4, 1915, the judgment of the trial court was affirmed.

After the Supreme Court entered judgment pursuant to its decision, affirming the judgment of the First Circuit Court of the Territory of Hawaii, the present writ of error was sued out.

### SPECIFICATIONS OF ERROR.

The plaintiff in error relies upon the following errors assigned:

I. That the Supreme Court of the Territory of Hawaii erred in affirming the action of the Honorable W. L. Whitney, Second Judge of the said Circuit Court, in denying the motion of the defendant in said action, plaintiff in error, for a judgment of non suit, for the reason that the statute of uses executed the use.

II. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following seventeenth assignment of error:

“17. That the court erred in sustaining the objection of plaintiff to and rejecting the evidence offered by defendant of a deed from Robert Wyllie Davis

and wife to John K. Sumner, of an undivided one-half interest in the land known as Mokapu, dated January 1, 1906, and recorded on March 4, 1908, in liber 302, on page 192.

“Plaintiff’s objection was that it was incompetent, irrelevant and immaterial, and defendant was estopped from introducing any such deed in evidence.”

III. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following eighteenth assignment of error :

“18. That the court erred in sustaining the objection of plaintiff to and rejecting the offer of the defendant of a certain mortgage from Robert Wyllie Davis and wife to John K. Sumner, dated January 2, 1906, and recorded on March 4, 1908, in the office of the Registrar of Conveyances of the Territory of Hawaii, in liber 303, at page 91, whereby the said Robert Wyllie Davis conveyed by way of mortgage to the said John K. Sumner an undivided one-half interest in and to the land of Mokapu.

“Plaintiff’s objection was that this evidence was incompetent, irrelevant and immaterial, and that defendant was estopped from introducing such mortgage in evidence.”

IV. That the Supreme Court of the Territory of Hawaii erred in its judgment affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, for the reason that said judgment was and is contrary to the evidence and the law.



## ARGUMENT.

## I.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN AFFIRMING THE ACTION OF THE HONORABLE W. L. WHITNEY, SECOND JUDGE OF THE SAID CIRCUIT COURT, IN DENYING THE MOTION OF THE DEFENDANT IN SAID ACTION, PLAINTIFF IN ERROR, FOR A JUDGMENT OF NON SUIT, FOR THE REASON THAT THE STATUTE OF USES EXECUTED THE USE.

It is the contention of the plaintiff in error that the trust as to the life estate of Davis, is a mere passive one, as the use was executed, hence, Holt, as trustee, had no right, title or interest in the premises when he executed the lease under which defendant in error claims.

Prior to the enactment of the statute of uses, upon the creation of the trust, the trustee was always the holder of the legal title, and the *cestui que* took only the equitable estate or beneficial interest. The effect of the statute of uses was to destroy the estate of feoffee to use and to transfer it by the very act that created it to the *cestui que* use as if the seisin or estate of the feffor together with the use had passed from the feffor to the *cestui que* use.

Where the *cestui que* trust is entitled to the possession of the *res* without accounting to any one, the

whole title vests in him, and the trust is passive.

Perry on Trusts, Volume 1, Section 306, contains the following:

“If, however, the trust simply is to permit and suffer A. to occupy the estate, or to receive the rents, the legal estate is executd in A. by the statute.”

In *Morgan v. Morgan*, 55 S. E. (W. Va.) 391, the following language appears:

“This second clause of the provision of the deed under consideration is preceded by a clause requiring the trustees to permit the wife to occupy, possess, and enjoy the land, and the rents, issues and profits thereof, for her sole use and benefit, from etc., for and during her life, and succeeded by clauses intended to create a limitation over after the wife’s death in case she should not exercise the power of disposition. Do these provisions cut down the wife’s estate to an equitable estate for her life? Judge Green, delivering the opinion of this court in *Milhol-len v. Rice et al.*, 13 W. V. 510, in which the provisions of a will were under consideration, laid two propositions which he considered established: First, that ‘it is settled that if a testator gives property to a devisee or legatee, to use’ or dispose of at his pleasure—that is, to consume or spend, sell, or give away at his pleasure—‘such devisee or legatee has the fee simple or absolute property, even though his interest in it be called by the will a life estate, and there be a provision in the will whereby what may remain of the property at the death of the devisee or legatee is given to another person’.”

In *Hallyburton v. Slagle*, 41 S. E. (N. C.) 877, the following language appears:

“The deed to Woodfin was a naked trust for the benefit of the *cestui que trustent*. He had not a thing to do—not even to receive the rents and pay them over. But the *cestuis que trustents* were to occupy, use and enjoy it in their own way without being accountable to any one. This gave them the entire estate.”

The plaintiff in error contends that since he had the right to occupy, use and enjoy the trust property in his own way without accounting to any one, the trust was passive. The language of the trust deed “or in the discretion of the said Robert Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing or agricultural purposes” is sufficient to bring the life estate of Davis within the authorities above cited.

In answer to the point under consideration, the Supreme Court of the Territory of Hawaii in 22 Haw. 51, used the following language:

“Under the third ground of the motion for a non suit, the defendant’s contention is that the ‘trust as to the life estate to Davis is a mere passive one and the use must be considered as executed’; that ‘an absolute life estate vested’ in Davis, and that ‘hence, the lease to Gear was a nullity, the legal and equitable estate was merged in Davis, and Holt had no title and could give no title.’ It is settled in this jurisdiction that to the application of the statute of uses ‘there are certain well defined exceptions or rather rules of construction which limit the effect of the statute,’ that special or active trusts were never within the purview of the statute, and that ‘if the purpose of the trust is to protect the estate for a given time or until the death of someone, \* \* \* the operation of the statute is excluded and the

trusts or uses remain merely equitable estate.' *Estate of Boardman*, 5 Haw. 146, 147; *Kidwell v. Godfrey*, 14 Haw. 138, 140. The trust under consideration was, after the determination of the lease referred to in the deed, to pay the rents, issues and profits to Davis for life, or in the discretion of Davis to permit him to reside upon the land and while so residing to use it for grazing or agricultural purposes. The right was not granted to Davis to use the land directly for the remainder of his life, but only during the period or periods when he might see fit to reside on it; nor was the right given him even during these periods of residence to use the land for any and all legitimate purposes. Both the time and the manner of the use were restricted. It is obvious that one of the purposes of the trust was to protect the estate even against Davis himself, at lease until the death of Davis and thereafter to convey the remainder to those entitled under the terms of the instrument. Even as to the interest of Davis, this was not a mere passive trust. The trustee had active duties to perform for the protection of the property and the trust as to Davis is not within the operation of the statute."

We maintain that the language of the trust deed, "or in the discretion of the said Robert Wyllie Davis to permit him to reside upon said premises, and while so residing to use the same for grazing or agricultural purposes," taken together with the fact that the trustor intended the whole beneficial interest in the *res* should be vested in Davis, is sufficient to bring the life estate of Davis within the meaning of the cases which hold, that where the beneficiary is entitled to the possession of the trust property the use is executed.

We do not think it can be said that the right to



use the land for grazing or agricultural purposes was for the preservation of the estate, nor do we think if Davis chose to reside upon the land he would be compelled to use it for those specific purposes. If the trustee could lease trust property for mining purposes, or other profitable purposes than grazing or agricultural ones, why construe the deed in such a way that Davis could only use the premises for grazing and agricultural ones? If it could be said that the right to use the land for grazing or agricultural purposes was for the preservation of the property, the question arises, would not the trustor have prohibited the trustee from leasing the land for any other than grazing and agricultural purposes? Surely, if the trustee could secure a better profit by leasing the land for other purposes than those contained in the deed, it would be his duty to do so. It would follow that if the trustee could secure a larger amount of rent for leasing for other purposes than those contained in the deed, Davis would not insist upon using the premises, and, hence, the property would not be preserved. It is our opinion that the trustor's main intention was to give his nephew Davis the largest income the property would be capable of earning during his life. Is it not more in accord with the trust deed in construing the expression "to use the same for grazing and agricultural purposes" with the whole deed, to say that the trustor intended Davis should receive either the rents, issues and profits, or he could go into possession of the land himself and use it for

any purpose he desired, including grazing and agricultural ones? No doubt at the time the trust deed was executed the premises were used for grazing and agricultural purposes, and, too, it is altogether probable that the property would yield a greater amount of rent for those purposes, at that time, than for any other purposes. It appears to us, as above stated, that the right to use the land for grazing, etc., was only one of the purposes that Davis might go into possession and exercise. We maintain also that if the latter expression was for the purpose of preserving the trust property the trustor would have imposed upon the trustee the duty to lease the land for grazing or agricultural purposes exclusively.

Since the plaintiff in error had the right to occupy the trust *res* without accounting to any one during his life, the statute of uses executed the use and vested the *cestui que* trust with the legal title. The plaintiff in error was the owner of a life estate in the property, and, hence, the lease executed by the purported trustee did not convey any title to the trust property, and the motion for judgment of non suit should have been granted.

## II.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING AND DECIDING THAT NO ERROR HAD BEEN COMMITTED BY THE TRIAL COURT AS ALLEGED IN THE FOLLOWING SEVENTEENTH ASSIGNMENT OF ERROR:

"17. That the court erred in sustaining the objection of plaintiff to and rejecting the evidence offered by defendant of a deed from Robert Wyllie Davis and wife to John K. Sumner, of an undivided one-half interest in the land known as Mokapu, dated January 1, 1906, and recorded on March 4, 1908, in liber 302, on page 192.

"Plaintiff's objection was that it was incompetent, irrelevant and immaterial, and defendant was estopped from introducing any such deed in evidence."

Before proceeding with the argument under the above specification of error, we will briefly set forth the object of the statute under which the within action was brought.

Section 2750 of the Revised Laws of Hawaii, 1915, under which the defendant in error proceeded against the plaintiff in error, provides as follows:

"Section 2750. Object of Action. Action may be brought in any of the circuit courts by any person against another person, who claims adversely to the plaintiff, an estate or interest in real property, for the purpose of determining such adverse claim."

The first Hawaiian case decided under the above section was *Kahoiwai v. Limeau*, 10 Haw. 507, and the court used the following language:

"The plaintiff by the statute may proceed against any person who claims adversely and *whose claim he desires to have determined.*"

In *T. R. Mossman v. S. B. Dole et al.*, 14 Haw. 365, the following language appears:

“The first section provides that the action may be brought against any one who claims adversely an ‘estate or interest \* \* \* for the purpose of determining such adverse claim.’ The Supreme Court of California in construing a similar section said: ‘It will be noticed that’ the section, ‘which provides for the determination of adverse claims to realty, is very broad in its terms, and includes all adverse interests, from a claim of title in fee to the smallest leasehold,’ citing *Landregan v. Peppin*, 94 Cal. 465, 467.”

In *Landregan v. Peppin*, 94 Cal. 465, the case referred to in the above citation, the following appears:

“Section 738 of the Code of Civil Procedure provides ‘an action may be brought by any person against another who claims an estate or interest in real property adversely to him, for the purpose of determining such adverse claim.’ \* \* \* It will be noticed that Section 738 of the Code of Civil Procedure, which provides for the determination of adverse claims to realty, is very broad in its terms. \* \* \* *The section of the code provides that if the judgment upon the main question, to wit, the adverse claim, be for the plaintiff, then he may have a writ for the possession of the premises.*”

In *Castro v. Barry*, 21 Pac. (Cal.) 946, the following language appears:

“The provision of the Code of Civil Procedure is as follows: ‘Section 738. An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim.’ \* \* \*

“The statutory action to determine an adverse claim is an improvement upon the old bill of peace. The statute enlarges the class of cases in which equi-



table relief could formerly be sought in the quieting of title. It is not necessary as formerly, that the plaintiff should first establish his right by an action at law. He can, immediately upon knowledge of the assertion of such claim, require the nature and character of the adverse estate or interest to be produced, exposed and judicially determined, and the question of title be thus forever quieted. *Curtis v. Sutter*, 15 Cal. 262, 263; *Stark v. Starr*, 6 Wall. 409. Nor is it necessary that adverse claims should be of any particular character. As said by Baldwin, J., delivering the opinion in *Head v. Fordyce*, 17 Cal. 151, the statute 'does not confine the remedy to the case of an adverse claimant setting up a legal title or even an equitable title; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertions of an outstanding title already held or to grow out of the adverse pretension'."

In *Peterson v. Gibbs*, 147 Cal. 5, the following language appears:

"The mere fact that a defendant in an action brought under the provisions of Section 738 of the Code of Civil Procedure is shown to have some valid interest or estate in the property in controversy, does not warrant the denial of all relief to the plaintiff who has also shown a valid interest therein.

"Such an action is brought, as authorized by the statute, for the purpose of determining any adverse claim that may be asserted therein by a defendant to the land in controversy, and this does not mean that the court is simply to ascertain as against a plaintiff shown to have a legal interest, whether or not such defendant has some interest, *but also that the court shall declare and define the interest held by the defendant, if any, so that the plaintiff may have a*

*decree finally adjudicating the extent of his own interest in the property in controversy.* \* \* \* Of course if the plaintiff fail to show any legal interest in the property in controversy and as to which he asserts title, he must fail altogether, and could not complain of a judgment of non suit. But where he shows any legal interest, he is entitled to have that interest declared by the court."

It is obvious that under the above authority the duty of the court is to declare the interests of each party in and to the premises the plaintiff claims an interest therein.

In *Pennie v. Hildreth*, 22 Pac. (Cal.) 398, the following language appears:

"The code provides 'an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.' Code of Civil Procedure, Section 738. The letter of this section would authorize any person to maintain the action whether he himself, had any interest in the property or not. We are not, however, inclined to give it this broad construction. But it is clearly not necessary that we have title to the property. If he has the right to possession, and another is claiming an estate or interest adverse to such right, he may maintain the action. The language of the code is broad enough to cover every interest or estate in lands of which the law takes cognizance. Citing cases. \* \* \*

"\* \* \* *But the basis of his right to require the adverse interest to be produced and adjudicated is his own interest in or ownership of the land. This is the one thing necessary for him to prove in order to make out his case. If it is denied, a material issue is raised, which casts upon him the burden of*

*proving such interest or ownership. Until he does this the defendant is not called upon to produce or prove his claim. Therefore the general denial put in issue a fact necessary to the plaintiff's recovery, and the demurrer to it was improperly sustained. Citing cases.* The correctness of the rule that a plaintiff must prove, under a general denial, either that the defendant claims an interest in the land, or that his claim is unfounded, may be a matter of question, but there is no question in our minds that such an answer renders it *absolutely necessary for him to prove his own title or interest in the land, and that, without such proof, he is not entitled to judgment.*

"The question as to the sufficiency of the special answer of the defendant presents a more difficult question. The respondent attacks it on the ground that the same set up that the only interest in the property was by way of a mortgage in the form of a deed, and that there was no offer to redeem shown or tender of the money due, and that such offer to redeem, or tender, was necessary to entitle him to relief in equity or deprive the plaintiff of his right to possession under the deed.

"\* \* \* It is not necessary to the right of a defendant to recover in this kind of action that he should show that the plaintiff has no title or interest in the property. If the plaintiff claims a fee simple he may show that he has nothing more than a lien, or any interest less than he claims, and that he, the defendant, has an interest also, either paramount or subordinate to that of the plaintiff, and the decree of the court should declare the rights of the parties in the property accordingly."

It will be seen that in actions brought under the section under consideration, the main question presented is the determination of the adverse claim of the defendant. It is an elementary rule of statutory

construction that where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the legislature of the same state or country or by that of another, that construction is to be given to the latter statute. *Commonwealth v. Hartnett*, 3 Gray 450; *Rigg v. Wilton*, 13 Ill. 15; *Adams v. Field*, 21 Vt. 256. It is to be presumed in such case that the legislature which passed the later statute knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law. *Potter's Dwarris Stat.* 274.

It is the contention of the plaintiff in error that the deed of an undivided one-half of the subject matter of the within suit executed by the plaintiff in error, should have been received in evidence as it tended to show that the defendant in error had no title to the subject matter. Since the basis of the plaintiff's right to require the adverse interest of the defendant to be produced and adjudicated is his own interest in the land, any evidence which shows that the plaintiff has no title constitutes a complete defense under Section 2750 of the Revised Laws of Hawaii.

The conveyance made by the plaintiff in error to the assignee therein vested in him all of Davis' right to an undivided one-half of the property under the trust deed. No valid lease of the property could be made by the trustee without the assignee's consent even if the trust was active. It readily follows that



under the theory that the trust was active, assuming that the defendant in error had made out a *prima facie* case against plaintiff in error, the plaintiff in error ought to be able to rebut the *prima facie* case by showing any facts which would tend to defeat the case made out by the defendant in error.

In *Williams v. City of San Pedro*, 94 Pec. (Cal.) 234, the following language appears:

"It is elementary that a plaintiff in an action to quiet title cannot prevail unless he shows title in himself. If he has no title, he cannot complain that some one else, also without title, asserts an interest in the land. *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398; *United Land Ass'n, etc., v. Pac. Imp. Co.*, 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988; *City of San Diego v. Allison*, 46 Cal. 162; *City and County of San Francisco v. Ellis*, 54 Cal. 72; *Winter v. McMillan*, 87 Cal. 256, 25 Pac. 407, 22 Am. St. Rep. 243; *Heney v. Pesolli*, 109 Cal. 58, 41 Pac. 819; *McGrath v. Wallace*, 116 Cal. 551, 48 Pac. 719; *McKenzie v. Budd*, 125 Cal. 602, 58 Pac. 199; *Schroder v. Aden G. M. Co.*, 144 Cal. 630, 78 Pac. 20. *A defendant in such an action may always effectually resist a decree against himself, by showing simply that the plaintiff is without title.* If plaintiff here had simply shown himself to be in possession of the land involved, he would have made a *prima facie* case of ownership, and would have been entitled to judgment in the absence of proof of actual ownership by defendants. He did not do this, but relied solely on the certificate of purchase, as a conveyance by the state to him. This, valid on its face, would have been *prima facie* evidence of ownership if it is true, but would have been no more, and defendants necessarily would have had the right to show the facts *aliunde* which rendered it worthless and inoperative as a conveyance, and thus rebut the *prima facie* case of ownership in plaintiff. It being estab-

lished that a patent issued under such circumstances is absolutely void and collaterally assailable in any form of action, this result inevitably follows. Accompanied, as the offer of this evidence by plaintiff was, by the admission of plaintiff of the facts showing the invalidity of the proceedings of plaintiff for the purchase of the land and the certificate of purchase based thereon, all of which defendants would have been entitled to show if the admission had not been made, the trial court did not err in sustaining the objection of defendants to the evidence."

It follows that the evidence offered by the plaintiff in error should have been admitted upon the theory that it tended to rebut the *prima facie* case of ownership made out by the defendant in error.

Could it be argued that the only assignable interest the beneficiary had under the trust was the rents?

We maintain that the assignment of Davis of his undivided one-half interest of the trust *res* to Sumner passed all of Davis' right therein, including his right to use the premises for grazing or agricultural purposes.

39 Cyc. 228 lays down the following rule relative to the interest of a beneficiary under an express trust:

"EXTENT OF ESTATE OR INTEREST OF *CESTUI QUE* TRUST. EXPRESS TRUSTS. (1) IN GENERAL. In determining the extent of the estate or interest of the beneficiary of an express trust the intention of the creator of the trust as ascertained from a consideration of all the provisions of the instrument declaring the trust must be given

effect, if practicable and not contrary to law, and so far as is consistent with the rules of legal construction, for, in the construction of the limitations of a trust, courts of equity follow the rules applicable to legal estates. The *cestui que* trust takes the same estate in duration as though the estate were legal instead of equitable; thus, the *cestui que* trust may take an equitable life estate, or an equitable fee simple. A contingent, as well as a vested, interest may be created by a valid deed of trust; and an estate upon condition may be thus created; and if the condition is a condition precedent the vesting of the estate is dependent upon the performance of the condition, but if it is a condition subsequent the estate vests immediately and the non-performance of the condition renders it liable to be defeated. There are no technical words to distinguish these conditions, and whether they be the one or the other is a matter of construction and depends upon the intention of the party creating the estate. The estate of the beneficiary may be a determinable fee, a fee conditional, or a conditional limitation."

Deeds of trust are construed by the same rules relative to all deeds and conveyances. In determining the nature and terms of the deed of trust, the object is to ascertain the intention of the trustor, just as the terms of any conveyance is determined by the intention of the grantor. It readily follows that the interest of the *cestui que* trust under the trust deed in the case at bar must be determined by the above rule.

What was the intention of the creator of the trust in the present case relative to the estate or interest the beneficiary Davis should have?

An examination of the trust deed discloses that

the trustor intended that, (1) he (trustor) should receive the entire beneficial interest in the trust *res* while the outstanding lease was in existence; (2) after the lease had expired he intended all his interest should pass to Davis. (And here it is well to note the trustor uses the identical words in describing Davis' interest, to wit, "to pay the rents, issues and profits as those from which his interest is determined," which expresses his intention quite clearly, that Davis is to succeed to all his rights, and we do not think any court would dispute the proposition that while the lease was outstanding Sumner (trustor) had the exclusive equitable title to the trust *res*. However, the trustor extends Davis' interest one step further by the use of the language "or, in the discretion of the said Robert Wyllie Davis to permit him to reside upon said premises and while so residing to use the same for grazing and agricultural purposes, etc.," giving him the right of possession coupled with all the profits of the *res*.) (3) Upon the death of Davis his wife was to receive the entire estate; and (4) if Davis' wife was not living, then his heirs at law would be vested with the legal and equitable title.

The instrument as a whole declaring the trust must be considered to ascertain the nature and terms of the trust, and where a conveyance of property is expressly susceptible of conflicting interpretations the one which will carry out the main purpose of the trustor should be adopted.



We maintain that the unquestionable intention of the trustor was to give his nephew Davis the entire beneficial interest in the land in question during the term of his natural life, and that he could either receive the rents, issues and profits or he could use the premises for any lawful purpose.

Is there any other means by which the grantor can show that he intends to bestow upon a grantee the whole beneficial interest in property during the life of the grantee more plainly when, as in the present case, the grantee can either receive the rents, issues and profits of the property, or, if he desires, he can go into the exclusive possession thereof?

Can there be any question as to Davis' interest when, under the terms of the trust, he is clothed with both the equitable title and the right to possession?

In the case of *Young v. Bradley*, 101 U. S. 782, 25 L. Ed. 1044, we find the following:

"The doctrine is well settled that, whatever the language by which the trust estate is vested in the trustee, its nature and duration are governed by the requirements of the trust. If that requires a fee simple estate in the trustee, it will be created, though the language be not apt for that purpose. If the language conveys to the trustee and his heirs forever, while the trust requires a more limited estate, either in quantity or duration, only the latter will vest.

"Mr. Perry, in his work on Trusts, supports, by a very full array of authorities, these two propositions in regard to the construction of instruments out of which trust estates arise: 1—'Whenever a trust is created, a legal estate sufficient for the purposes of

the trust shall, if possible, be implied in the trustee, whatever may be the limitations in the instrument, whether to him and his heirs or not.' 2—'Although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires.' Perry on Trusts, Sect. 312. Again he says, 'In the United States the distinction between deeds and wills in respect to the trustee's estate has not been kept up; and the general rule is that whether words of inheritance in the trustee are, or are not, in the deed, the trustee will take an estate adequate in the execution of the trust, and no more nor less.' Sect. 320."

Suppose in the present case the trustor simply used the language "to pay the rents, issues and profits to Davis during the term of his natural life," without adding the discretionary clause. Under the above assumption, if Davis desired to occupy the land instead of receiving the rents, could the trustee claim Davis would not be entitled to such right under the trust? Just as long as Davis was receiving the exclusive interest in the trust *res* the intention of the trustor would be carried out and the trustee would be doing his duty under the trust. We do not contend that a beneficiary would in every case be entitled to the possession of the property, for the very nature of the property would not permit such a right in some cases. Where, however, the property is similar to that in the case at bar, the trustee in permitting the beneficiary to occupy the land would not be committing a breach of trust, nor would it be said the intention of the trustor was defeated if he

permitted the beneficiary to occupy the trust *res*. By the use of the terms "rents," "issues" and "profits" the entire beneficial interest is intended.

In 28 Am. & Eng. Enc. of Law, 2nd Ed., page 106, we find the following:

"Since the *cestui que* trust is the beneficial owner of the trust property, he is generally entitled to the possession thereof for the purpose of the enjoyment of his beneficial ownership, unless the duties imposed on the trustee require him to retain the possession, or there is otherwise manifested in the trust instrument an intent that the *cestui que* trust should not have the possession.

"Thus the general rule is that when real estate is conveyed or devised to a trustee to pay the rents and profits to the *cestui que* trust, the *cestui que* trust is entitled to the possession, even though there are charges on the property. \* \* \* The *cestui que*'s equitable interest may be mortgaged, unless the terms of the deed of trust expressly or impliedly provide otherwise.

"The *cestui que*'s equitable interest may be assigned, even though it may be defeated by a contingency. But in such a case the assignee takes subject to the contingency."

Assuming that the trust under the deed under consideration was active, would Davis have an assignable interest, and did his right to use the premises for grazing and agricultural purposes pass to the assignee Sumner?

Pomeroy's Eq. Juris., Vol. 3, page 992, contains the following:

“CLASSES OF ACTIVE TRUSTS. — Although active trusts may be created for a great number of special purposes, those which are the most frequent and important may be reduced to the four following generic classes: 1. Where the trust is simply to convey the property to some designated person, or class of persons. 2. Where the primary object is to sell or dispose of the entire trust property in some manner and to use the proceeds for some ulterior purposes. In all instances of this class, where the trust is to sell corpus of the property and to distribute the proceeds among creditors, legatees and the like, the beneficiaries plainly acquire no proper estate in the original trust fund prior to its sale; their right and interest attach to the proceeds of this fund, which are to be paid to or distributed among them. In order to make their right fully available, and to guard their interest as much as possible against the large authority given to the trustees, equity has invented in such cases the doctrine of conversion by which real property is regarded as personal, and personal property as real. 3. This class includes all those trusts where the primary object is to hold and invest the entire property and its proceeds, and thus to accumulate for some ulterior purposes. 4. *This class includes all those trusts of which the primary object is to hold the corpus of the property, receive its rents, profits and income, and apply them to some prescribed uses. More than one of these four general objects may be embraced in the same trust. In instances of the third and fourth classes, the beneficiaries may have direct equitable interest in the trust property itself, which is plainly more than a mere right of action, but is not so substantial an estate as that held by the cestui que trust under a simple passive trust.*”

Speaking of the fourth class above mentioned, the following note on page 993 appears :



“The forms of this class also are various. Real or personal property, or both, is sometimes given by will upon trust to hold the capital and apply the income to the payment of debts, legacies, annuities, etc.; property, real or personal, or both, is given by will or by deed in trust to receive the rents and profits and pay the same to or apply them to the use of designated beneficiaries during their lives, or for some specified period. In this manner provision is often made for wives in marriage settlements, and for widows and children by will.”

Davis being the equitable owner, could he alienate his rights in the trust *res*?

The Supreme Court of the United States in the case of *Croxall's Lessor v. Shenerd*, 5 Wall. 268, 18 L. Ed. 572, speaking of a *cestui que's* interest, lays down the following proposition:

“In the consideration of a court of equity the *cestui que* trust is actually seized of the freehold. He may alienate it; and any legal conveyance by him will have the same operation in equity upon the trust as it would have had at law upon the legal estate.

“The trust, like the legal estate, is descendable, devisable, alienable and barrable by the act of the parties and by matters of record. Generally, whatever is true at law of the legal estate is true in equity of the trust estate.”

We do not think that Davis' right to assign his interest under the deed in consideration can be questioned, especially under the law as laid down in the above authority. We think the following authorities will bear out the last statement:

In *Nichols v. Levy*, 5 Wall. 433, 18 L. Ed. 598, Mr. Justice Swayne says:

“It is a settled rule of law that the beneficial interest of the *cestui que* trust, *whatever it may be*, is liable for the payments of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and immunity from his creditors. A condition precedent that the provision shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency with a limitation over to another person, are valid and the law will give them full effect. Beyond this protection from the claims of creditors it is not allowed to go.”

Surely, if Davis' interest is liable for the payment of his debts, it is assignable.

In *Nichols v. Eaton*, 91 U. S. 717, 23 L. Ed. 254, the following doctrine is laid down :

“The claim of the assignee is founded on the proposition, ably presented here by counsel, that a will which expresses a purpose to vest in a devisee either personal property, or the income of personal or real property, and secure to him its enjoyment free from liability for his debts, is void on grounds of public policy as being in fraud of the rights of creditors, or as expressed by Lord Eldon in *Brandon v. Robinson*, 18 Ves. 433: ‘If property is given to a man for his life, the donor cannot take away the incidents of a life estate.’

“There are two propositions to be considered as arising on the face of this will as applicable to the facts stated: 1. Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated; and, 2. If so, is that principle to be the guide of a court of the United States sitting in chancery?

“Taking for our guide the cases decided in the English courts, the doctrine of the case of *Brandon v. Robinson* seems to be pretty well established. It is equally well settled that a devise of the income of property, to cease on insolvency or bankruptcy of the devisee, is good, and that the limitation is valid. *Dommett v. Bedford*, 3 Ves. 149; *Brandon v. Robinson*, 18 Ves. 429; *Rockford v. Hackman*, 9 Hare 475; *Lewin, Tr.*, 80, Ch. VII, Sect. 2; *Tillinghast v. Bradford*, 5 R. I. 205.

“If there had been no further provision in regard to the matter in this will than that on the bankruptcy or insolvency of the devisee, the trust as to him should cease and determine; or, if there had been a simple provision that, in such event, that part of the income of the estate should go to some specific person other than the bankrupt, there would be no difficulty in the case. But the first trust declared after the bankruptcy for this part of the income is in favor of the wife, child or children of such bankrupt; and in such manner as such trustees in their discretion shall think proper.”

In *Sears v. Chate*, 146 Mass. 395, 4 Am. St. Rep. 322, the court says:

“This court has held that a founder of a trust may give an equitable life tenant a qualified estate in income which he cannot alienate and which his creditors cannot reach. *Broadway National Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504. *But in order to give such a qualified estate instead of an absolute one, the language of the founder must be clear and unequivocal to that effect.* Taking this will as it is, we should not be justified in holding that the plaintiff took anything less than an absolute equitable estate both in the income and in the corpus of the trust.”

*Maynard v. Cleaves*, 149 Mass. 307, contains the following language:

“It is settled in this commonwealth that a testator who makes a gift of income to a beneficiary may provide that it shall not be alienable in advance by him or be subject to be taken by his creditors. *But in order to give such a qualified estate instead of an absolute one, the language of the testator must be such as clearly to import an intention to do so.*”

*Kessner v. Phillips*, 189 Mo. 515, 88 S. W. 66, 107 Am. St. Rep. 374:

“‘On the other hand, where the cestui que trust has an absolute right to the fund or its avails, such as a right to occupy the land and to receive the income therefrom, \* \* \* or where it is his absolute property and may therefore be alienated by him,’ or, where the land is conveyed upon a simple condition that it shall not be subject to the grantee’s debts, no spendthrift trust arises or is created, and the donee’s interest may be sold under execution or sequestrated in equity. 26 Am. & Eng. Enc. of Law, 2nd Ed., 144; 1 Jones on Real Property, Sect. 663; Gray’s Restraints on Alienation, Sect. 259; *Potter v. Merrill*, 143 Mass. 190, 9 N. E. 572; *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. 76; *Smeltzer v. Gozlee*, 172 Pa. St. 298, 34 Atl. 44; *Young v. Easley*, 94 Va. 193, 26 S. E. 401.”

Perry on Trusts, Vol. II, Sect. 287a:

“At common law, a man cannot attach to a grant of property or estate otherwise absolute, the condition that it shall not be alienated, and in England, Rhode Island, South Carolina and North Carolina, the same rule is adopted as to equitable estates for life; but in Pennsylvania, Vermont and Massachusetts, the founder may provide that the income shall



not be alienated by anticipation, nor subject to be taken for debts until paid over to the *cestui*. It is not possible, however, for a man to create a trust to pay the income to himself for life with a provision against alienation by anticipation so as to prevent his creditors from coming at the income by a bill in equity. A *cestui* having a vested equitable interest, though contingent, may convey it subject to the contingency."

*Whipple v. Fairchild*, 139 Mass. 264:

"The only question presented by this report is whether Silas Fairchild took under the Deed of Trust of his father to Hawks, any estate which was assignable by him during the life of his father.

"By this deed, the Merry Place, so called, is conveyed to Hawks upon the following trusts: 1. To allow the grantor to occupy the premises and to receive the rents and profits. 2. To join with the grantor in such conveyances as he should make if the trustee in his discretion should deem it expedient. 3. After the death of the said grantor, or at any time before his death, if the said trustee should be thereto requested by all the children then living and the wife of the grantor, the said trustee was to convey said property, in the former case, to the heirs of the said grantor, and in the latter case to the grantor or to such person or persons as he should nominate.

"The grantor did not convey during his life and the case presented is in substance one upon conveyance upon the trusts that the grantor shall have the use of the property during his life with a qualified power of appointment, and that at his death it shall be conveyed to his heirs.

"We are of the opinion that each of the children of the grantor took under the deed an equitable interest which, although it might be defeated by the contingency either of his death before the father or of the father's conveying under the power, was assignable by him subject to such contingency.

"In *Putnam v. Story*, 132 Mass. 205, a fund was bequeathed upon the trusts to pay the income to the daughter of the testator during her life, and at her death the capital sum to be divided among the heirs of the said daughter share and share alike. It was held that the children of the daughter took vested interests which they could assign during the life of their mother.

"The only material difference between that case and this is, that in the case at bar the life tenant had a conditional power of appointment. The vesting of their interests in possession might have been defeated by the exercise of that power; but we do not see how the existence of the power affected the nature of the estate of the children, except that it rendered it defeasible. As the power was not executed, their estate has not been defeated, but took effect *secundum formon doni*, as if the power had not existed. *Moore v. Wenker*, 16 Gray 305.

"We are therefore of the opinion that the deed of Silas Fairchild, son of the grantor—(and it was admitted that assignment was made during grantor's life)—to Frazier *conveyed the equitable interest in the Merry Place which the grantor at the time it was given had under the deed of trust*; and it follows that the plaintiff is entitled to a conveyance of an undivided sixteenth part of it subject to any charges which the trustee has against the estate."

*Smith v. Towers*, 69 Md. 77:

"In England, the decisions are all one way, and it is well settled there, that the devise of an *equitable estate or interest for life* to any person, other than a married woman, carries with it, as a necessary incident to such estate, or interest, the right of alienation by the *cestui que* trust, and is liable for the payment of his debts, and no provision by way of inhibition or otherwise, which does not operate as cesser or limitation over of the estate, can protect it against

the claims of creditors: *Brandon v. Robinson*, 18 Ves. 429; *Rochford v. Hackman*, 9 Hare 480; *Graves v. Dolphin*, 1 Sim. 66; *Green v. Spicer*, 1 Russ. & M. 395; *Younghusband v. Gisborne*, 1 Coll. C. C. 400.

“In this country, however, the decisions are conflicting, and the supreme court of the United States, and the supreme courts of other states have, after full consideration of the English cases, held that the power of alienation is not a necessary incident to an equitable estate for life, and that the owner of property may, in the free exercise of his bounty, so dispose of it as to secure its enjoyment to his beneficiary, without making it alienable by him, or liable in any manner for his debts, and that such an intention, *when clearly expressed by the founder of the trust, must be respected by the courts.* The supreme court, after reviewing the English decisions, in an able opinion by Justice Miller, says: ‘But the doctrine that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefit sought to be conferred by the testator’s affection or generosity, is one which we are not prepared to announce as the doctrine of this court. \* \* \* Nor do we see any reason, in recognized nature and tenure of property and its transfer by will, why a testator who gives, without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee.’ *Nichols v. Eaton*, 91 U. S. 725, 727.

“And in the still later case of *Broadway National Bank v. Adams*, 133 Mass. 170, argued in June, 1881, and reargued in March, 1882, the court unanimously held that property may be conveyed in trust, *with the provision that the income shall not be alienated by the beneficiary by anticipation, or be subject to*



*be taken by his creditors in advance of its payment* to him, although there is no cessor or limitation over of the estate in such an event. Morton, C. J., says: 'We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. \* \* \* Under our system, creditors may reach all the property of the debtor not exempt by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given.'

"And then, again, in *Rife v. Geyer*, 59 P. St. 393, Judge Sharswood, speaking for the court says: 'That a benefactor has the power of thus restricting the enjoyment of his bounty through the medium of a trust during the life of the beneficiary is now the unquestionable law of this state.' In *Shankland's Appeal*, 47 Id. 113, the point was expressly decided, and it was there held that a trust to collect and receive rents and pay over the same to a son of the testatrix for and during the term of his natural life, *without being subject to his debts and liabilities*, was an active one, and that the legal estate was vested in the trustee, and no act of the *cestui que* trust could deprive him of it, or allow him to interfere with the collection of the income, and no creditor could touch the income or any interest which the *cestui que* trust had in it.

"In Vermont, Connecticut and Kentucky, the highest courts have held that the income of property may be devised in trust for the benefit of the *cestui que* trust for life to the exclusion of the claims of his creditors: *Executors of White v. White*, 30 Vt. 338; *Leavitt v. Bierne*, 21 Conn. 1; *Pope's Ex'rs v. Elliott*, 8 B. Mon. 56.

"In other states, however, and it may be said in the majority of the states where the question has arisen, the English doctrine has been adopted with-



out qualification: *Tillinghast v. Bradford*, 5 R. I. 205; *Dick v. Pitchford*, 1 Dec. & B. Eq. 480; *Heath v. Bishop*, 4 Rich. Eq. 46; *Bailie v. McWhorter*, 56 Ga. 183; *Rugely and Harrison v. Robinson*, 10 Ala. 702."

Under the foregoing authorities, all doubts, if any may be said to have existed upon the question of Davis' right to assign his interest under the deed, are at an end. The trust deed will be searched in vain to find any expression of the trustor whereby an intention to secure the trust *res* from Davis' creditors or prohibit him from assignnig his interest can be found. On the contrary, the only restriction the trustor intended was relative to the time of enjoyment. The trustor intended that Davis was to receive the whole beneficial interest for the period of his natural life, and whether he received the beneficial interest by way of sale or mortgage of his estate or resided upon the trust property was wholly within his discretion. As far as the trustor was concerned, either of the foregoing could not be said to affect or be contra to his intention. All Davis could assign or sell was his life interest and upon his death the property would descend in accordance with the trustor's intention, namely, to Davis' heirs at law as provided in the deed.

The authorities cited show that the English courts seem to treat the right of alienation and liability for debts as inseparable incidents of the life estate whether limited by trust or otherwise. The only exception is where by the terms of the trust the estate reverts upon crtain contingencies which are nowhere

to be found in the trust under consideration. It must be observed in the case at bar that *no discretion* whatever is placed in the trustee. We maintain that the exclusion of the right of alienation and liability for debts can only be affected, if at all, *by the use of very clear and explicit terms, and such restriction cannot be implied from any dubious expressions but must be deducible from words that admit of no doubt whatever.*

It is also clear under the authorities cited that the American rule is not as strict as the English, and a majority of the states permit a restriction from alienation where, as said above, it is plainly deducible from the trust deed that the intention of the trustor was to restrict it.

Assuming that the only right Davis had under the trust deed was contained in the language "to permit him to reside upon the said premises and while so residing to use the same for grazing or agricultural purposes," could it be said that he simply had a mere personal license which he could not assign?

4 Cyc., page 14, contains the following:

"PARTICULAR RIGHTS AND INTERESTS.  
REAL ESTATE. *Any estate or interest in lands may be assigned, and this is so whether the estate be legal or equitable, vested or contingent. Mere personal licenses to use land are, however, not assignable. But grants or reservations in deeds of the right of entering the land and taking therefrom the products of the soil or the mineral underlying it, confer not merely personal licenses but such interest in the land as are capable of assignment.*"

We do not think even counsel for the defendant in error will dispute the fact that Davis has the right to use the premises for life as long as he used them for grazing or agricultural purposes. If a right to use land is given by deed to a person for life, provided he uses the same for grazing and agricultural purposes, does he possess any interest in the land? Ordinarily, a grant to A. for life, provided he use the granted premises for grazing or agricultural purposes, would be an estate upon condition subsequent, and, surely, if Davis could be said to own an estate upon condition subsequent, he must have had some interest in the trust *res*, and if it be designated a condition subsequent, could there be any question whether he could alienate it? We do not maintain that Davis' interest would simply be an estate upon condition subsequent under the assumed facts, it would be a greater interest, for in the case of condition broken in an estate upon condition subsequent, the title reverts to the donor, while in the present case, assuming Davis could only use the land for grazing and agricultural purposes, if he committed a breach of the condition he would still be entitled to the proceeds of the property, and upon making known his request to the trustee, he could subsequently use the premises for grazing again. Surely, it cannot be contended that if Davis could be said to have a greater estate than one upon condition subsequent he could not assign it.

If Davis could not be said to have possessed any

estate in the trust property, did he have an easement or a license, assuming that the trust deed simply contained the expression "to permit him to reside upon the land and while so residing to use the same for grazing or agricultural purposes during the term of his natural life?"

14 Cyc. 1144:

"An easement is a liberty, privilege or advantage in land without profit, existing distinctly from the ownership of the land, and because it is a permanent interest in the land of another, with the right to enter at all times, and enjoy it, it must be founded upon a *grant by writing* or upon prescription which presupposes a grant; but the license is an authority to do a particular act or series of acts upon the land of another, *without possessing any estate therein*. A license is founded on personal confidence and is not assignable and *requires no writing*, as it is not within the statute of frauds, and *is revokable at will*, while the grant of an easement is within the statute of frauds and must be in writing."

Licenses are sometimes misconstrued as easements, but, inasmuch as a license is a personal, and nearly always, a revocable privilege to do something upon the land of another without possessing any property or interest in it, whereas an easement always has reference to an interest in land, we hardly see room for the confusion of the terms.

From the above authority it would plainly appear that Davis had an easement in the land. The fact that a license is revocable at the will of grantor leaves the question of license out of the present case.



After the expiration of the outstanding lease, all the grantor's right, title and interest passed to the grantee thereunder, and having parted with all his right, he possessed no power to revoke any easement or rights conferred in the deed.

In *Fuhr v. Dean*, 26 Mo. 116, 67 Am. Dec. 487, the court, speaking of subject of license, uses the following language:

"Though it is difficult often to determine between an easement and a license, it seems to be settled that *the right to enter and remain on another's land for a certain time, or indefinitely, at the pleasure of the party claiming the privilege, is an interest in the land which can only be created by deed.*"

Counsel for defendant in error will concede that Davis had the right to enter and remain in possession of Mokapu for life at his pleasure, and that the interest was created by deed, and, as the above authority says, it is settled that such right is an interest in land, why carry our case any further? Being an interest in land, it was assignable.

The case of *Mumford v. Whitney*, 15 Wend. 392, 30 Am. Dec. 60, after reviewing the authorities on licenses, lays down the following decision which seems to be followed:

"Much of the discrepancy may have arisen from the different ideas attached to the word 'license.' If we understand it, as Chancellor Kent defines it, it seems to me there can be no difficulty. It is an authority to do a particular act upon another's land; is founded in personal confidence and is not assign-

able. For example, A. agrees with B. that B. may hunt or fish on A.'s land. A. thereby gives B. a license for that purpose. This gives B. no interest in the land; he cannot authorize any other person to go upon the land; it is a personal privilege granted to B. alone. If, after A. has given his consent, and before B. has entered upon his land, A. changes his mind, he has a right to do so and forbid B. from entering upon his land for the specified purpose. The license is thus far executory and may be revoked at pleasure. If B. afterwards enters, he is a trespasser. If, however, B. enters before any revocation of the license, the license is then executed, and it is not competent for A. to revoke it and make B. a trespasser. This doctrine is applicable *only to the temporary occupation of land and confers no right or interest in the land.*"

Applying this reasoning to the case at bar, it is plainly seen that Davis' rights under the trust deed were much greater than a mere license. If a license is executory while not being exercised, the question arises in the present case, at what time was Davis' right to use the premises for grazing and agricultural purposes executory? The moment Davis' rights under the deed in the present case sprung up, the grantor ceased, and he could neither grant nor revoke any rights after he executed the deed of trust, nor could he exercise any dominion over the property therein.

14 Cyc. 1140 defines an appurtenant easement as follows:

"Easements appurtenant inhere in the land, concern the premises, and are necessary to the enjoyment thereof. Such easements are incapable of

existence separate and apart from the particular message or land to which they are annexed, there being nothing for them to act upon. They are in the nature of covenants running with the land, attach to the land, to which they are appurtenant, and pass by a deed of conveyance."

14 Cyc. 1140 defines an easement in gross as follows:

**"EASEMENTS IN GROSS—1. IN GENERAL.** It has been contended that there can be no such thing according to the common law or the civil law as an easement in gross. But there is a class of rights which one may have in another's land without their being exercised in connection with the occupancy of other lands, and they are therefore called rights or easements in gross. In such cases the burden rests upon one piece of land in favor of a person or an individual; the principal distinction between an easement proper (the class of easements considered in the preceding section) and a right in gross is found in the fact that in the first there is and in the second there is not a dominant tenement. Furthermore, unlike easements appurtenant, an easement in gross cannot ordinarily be assigned or transmitted by descent, nor can the owner of the right take another person into company with him. Thus a right of way which has neither of its termini on the premises of the owner and is not appurtenant to any estate, is called a right of way in gross. It is a mere personal right and is neither assignable nor inheritable, nor can it be made so by any terms in the grant. But there are cases where it was the manifest intention of the parties to create an assignable interest, and in such cases the courts have given effect to that intention."

Easements of the last named are the only kind which cannot be alienated or assigned. It is well to

note that an easement in gross is distinguished from one appurtenant to the land in this way, that in the easement in gross there is no dominant tenement. It is plainly a personal right contradistinguished from a property right.

In *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 763, the language is as follows:

“The general rule is that two distinct tenements are necessary to the creation of an easement, the dominant, to which the right belongs, and the servient, upon which the obligation rests, as, if the owner of one farm has a right of way over the adjoining farm, that in favor of which the right is exercised is the dominant tenement, and that over which it is exercised is the servient tenement. *Washburn, Easem.*, 3 et seq.; *Garrison v. Rudd*, 19 Ill. 550.

“In easements of this character the burden rests upon one piece of land in favor of another piece of land. But there is a class of rights which one may have in another’s land without their being exercised in connection with the occupancy of other lands, and therefore called rights in gross. In such cases the burden rests upon one piece of land in favor of a person or individual. The principal distinction between an easement and a right of way in gross is found in the fact that in the first there is, and in the second there is not, a dominant tenement. The right of way is in gross and personal to the grantee because *it is not appurtenant to other premises*. The owner of the premises may grant the right of way in either form.”

Chancellor Kent says an easement in gross is a mere personal interest in the real estate of another not assignable and not inheritable. It dies with the person and is so exclusively personal that the owner



of the right cannot take another person in company with him.

In *Cadwalader v. Bailey*, 17 R. I. 495, 14 L. R. A. 300, it is said:

“Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. *If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land and not an easement in gross, the rule for the construction of such grants being more favorable to the former than to the latter class.*”

Can there be any doubt that the right to use the premises for grazing is an appropriate and useful adjunct of the land in the trust deed, and is there any doubt as to who the trustor had in mind when the deed was executed? Could it be said, however, that assuming that Davis only possessed the right to use the land for grazing and agricultural purposes, that his interest could not be said to be at least an appurtenant easement?

There remains another class of rights which are called profits a prendre. These are defined in 14 Cyc. 1142, as follows:

“The right to profits, denominated profits a prendre, consists of a right to take a part of the soil or produce of the land in which there is a supposable value. The right to enter upon the land of another

for any of the following purposes has been held to be a profit a prendre; to cut grass, to *depasture the land*, to shoot over the land and take game or wild fowl, to fish in an unnavigable stream, to take away drifting sand from the beach, or seaweed thrown upon the shore, to take iron ore from the land, to mine metals generally, to search for and dig coal, and to take timber from the land. Running water, whether above or below the surface, is not a product of the soil. \* \* \*

“Where this right is appurtenant to an easement, it cannot be severed and assigned separately. But if the right be granted to one in gross it is treated as an estate or interest in land which may be assignable or inheritable if granted in fee.”

*Tuncum Fishing Co. v. Carter*, 100 Am. Dec. 602, 61 Pa. St. 21:

“The distinction seems to be this: If the easement consists in a right of profits a prendre, such as taking soil, gravel, minerals, and the like, from another’s land, it is so far of the character of an estate or interest in the land itself that if granted to one in gross it is treated as an estate and may therefore be for life or inheritance. But if it is an easement proper, such as a right of way, and the like, and is granted in gross, it is a mere personal interest and not inheritable.”

In *Cadwalader v. Bailey*, 14 L. R. A. 300, the Supreme Court of Rhode Island lays down the following doctrine:

“We think the greater weight of the authorities supports the doctrine announced, that easements in gross properly so called, are not assignable or inheritable. If, however, a right to take soil, gravel, minerals, water from a spring, and the like, from

another's land may properly be denominated an 'easement,' then it is proper to say that an easement in gross—for such it might doubtless be constituted—might be both assignable and inheritable, for the rights enumerated are so far of the character of an estate or interest in the land itself, that if granted to one in gross it is treated as an estate and may therefore be one for life or inheritance."

Tiffany on Real Property, Vol. 1, page 743, speaking of the right of pasture, proceeds:

"The most important of the rights of profit aprendre, historically considered, is the right to pasture cattle on another's land, generally referred to as common of pasture. Under the feudal system the right existed in favor of the tenants of the manor as regards the waste land of the manor—that is, the land not allotted to tenants or reserved by the lord as demesne land.

"Common of pasture involves the placing of the cattle on the land to eat the herbage, in this differing from a right to take herbage from another's land by cutting and transporting it."

It is readily seen that if the trust deed in the present case simply conveyed the right to use the land for grazing and agricultural purposes, Davis would have an interest in the land which would be capable of assignment. Surely the right to use the land for grazing being an *incorporal hereditament* it was an interest in land and could be conveyed just the same as any other interest. When the fact that the deed under consideration is one of trust and the beneficiary is to receive the rents, issues and profits, is taken into consideration, how could it be said that

his right to reside upon the land and use it for grazing, etc., was a personal right? If Davis had the right to assign the rents, issues and profits of the land (and we understand counsel for defendant in error will concede this), why construe the deed in such a manner as would prohibit his right to use the premises from being assignable. Surely if the trustor intended he should have the right to assign one, is it not consistent to assume he could do likewise with the other? We maintain that the right to receive the rents, issues and profits would convey the right to possession under the trust deed, and that when Davis assigned his one-half, the right to possession also passed. It is worthy to note that Davis is the only person who could convey the last mentioned, and any conveyance of his interest in the *res* would include all of his rights.

We are of the opinion that the trustor intended that Davis should have the exclusive beneficial interest of the trust *res* during his natural life. The fact that the beneficiary could use the land for the term of his natural life alone, conveyed a life estate to him. The law is well settled that a devise of the use of the land is equivalent to the devise of the land itself, and carries the legal as well as the beneficial interest therein.

The following citations bear out all contentions advanced by the plaintiff in error. In the following cases where the trust was held active, an assignment



by the beneficiary of his equitable interest was upheld.

In *Henson v. Wright*, 12 S. W. (Tenn.) 1035, Justice Lurton lays down the following:

“Andrew Hamilton, in 1864, for love and affection, conveyed by deed certain lands to James Henson, ‘in trust, to hold said two tracts to the only proper use and benefit of my young friend, William A. Hamilton, who is now a scholar at the school of E. L. Crocker, in Davidson County, in the state of Tennessee. He is to hold said land for the benefit of the said William only, and to account to him or his guardian for the rents or yearly issues of said land. He is to hold said two tracts for the only proper use and benefit of him, the said William A. Hamilton, for and during the term of his natural life. At the death of said William A. Hamilton, leaving children or the descendants of children, he is to convey said lands to the children, to be held by them as tenants in common, the descendants to represent their ancestor. If the said William A. Hamilton should die in my life time, leaving no children, or the descendants of such, said trustee is to convey said land to me. If said William A. Hamilton should die after I do, and leave no children, or the descendants, then said trustee is to convey said land to my heirs, whoever they may be.’ In 1885 the trustee and the beneficiary joined in the execution of a mortgage upon the estate for life of the beneficiary in the lands so conveyed in trust to Henson. They now unite in this bill, for the purpose of restraining a sale of the supposed life-estate and to have the mortgage declared null and void, as having been executed without power in the beneficiary or his trustee. A demurrer was sustained, and the bill dismissed.

“The first contention of defendants is ‘that the conveyance from A. Hamilton to Henson, trustee, was a dry, naked trust, and the beneficiary took a

life estate in the property.' This is unsound. The duty to take, hold and convey the remainder, upon the death of the beneficiary for life, to persons who should then appear entitled under the provisions of the deed, makes the trust an active one. That the founder of the trust could, by way of executory devise, have disposed of the remainder, will not affect the character of the trust if he chose to resort to a trustee in preference. *Akin v. Smith*, 1 Sneed 309; *Hoobery v. Harding*, 10 Lea 398. If any trust or duty is imposed upon the trustee, either expressly or by implication, the trust is an active one; and in such case there is no merger of the legal and equitable estates, and the interest of the beneficiary not being a legal one, is not subject to levy by execution. *Henderson v. Hill*, 9 Lea 25; *Jourolmon v. Massengill*, 2 Pickle 93; 5 S. W. Rep. 719. The rule that a devise of the rents and profits of land is equivalent to a devise of the land itself only applies where no active trust is interposed. In *David v. Williams*, 1 Pickle 646, 4 S. W. Rep. 8, the devise of the rents and profits to the children of the devisor did not operate to devise them a legal estate for life in the lands, and this for the reason that an active trust was interposed between the legal and equitable estates. The trust in that case was held to be an active one, because it was the duty of the trustee to first apply the rents and profits to payment of taxes, and to keeping the property in repair and tenantable condition. The duty was peculiarly important, in view of the fact that upon the death of the children the rents and profits went to the grandchildren, and this trust not only preserved the remainder devised to the grandchildren, but preserved it in repair and tenantable condition. The duty of applying rents to repairs, or a trust to preserve contingent remainders, makes the trust an active one. *Perry Trusts*, Sect. 305. In the *Davis* case the trust ceased upon the death of the children, and the estate of the trustee was therefore cut down to an estate for life

of the children upon the doctrine that the trustee will take no greater estate than the objects of the trust require. The rents, being upon the death of the children, devised to the grandchildren, without any limitations, and the trust being no longer an active one, it was held to be equivalent to a devise of the remainder in fee. 1 Pickle 647, 4 S. W. Rep. 8. The trust in the case at bar was an active one and the legal estate did not pass to the beneficial owner. The interest of the beneficiary, Hamilton, was not such an one as could have been reached by a creditor through the instrumentality of a court of chancery. By Sections 4282-4285, Code Tenn., the court of chancery is given jurisdiction to subject to the satisfaction of the creditor choses in action, stocks and property held in trust for the debtor, 'except when the trust has been created by, or the property so held has proceeded from, some person other than the defendant himself, and the trust is declared by will, duly recorded, or deed, duly registered.' This legislative provision operated to deprive the chancery court of any jurisdiction which it might have otherwise had to subject the interest of a beneficiary under such a trust as that described. *Jourolmon v. Massengill*, 2 Pickle 121, 5 S. W. Rep. 719.

*"But does it follow that, because the interest is such an one as cannot be reached by execution at law, or by bill in equity, that therefore it is inalienable?"* The trust is distinguished from the one in favor of Massengale in that all power of alienation was expressly withheld from the beneficiary, Massengale, and in that the income was expressly appointed to be used alone in the support of the *cestui que* trust. That trust was distinctly a spendthrift trust, and is so treated throughout the opinion. But learned counsel endeavored to bring this trust within the principles of the Messengale case *by the contention that this trust is founded for a special use and purpose, the education and personal support of the beneficiary, and that the power of alienation is*



*therefore repugnant to the purposes of the founder, and, by necessary implication, withheld.*

“The words relied upon as constituting this a trust for the personal support and maintenance of the beneficiary are these: ‘for the only proper use and benefit of my young friend, William A. Hamilton.’ And, again, that the trustee ‘is to hold said lands for the benefit of said William A. Hamilton only, and to account to him or his guardian for the rents or yearly issues of said land’; and that ‘he is to hold said two tracts for the only proper use and benefit of him, the said William A. Hamilton, for and during his natural life.’ These words do not limit the interest of the *cestui que* trust to his support and maintenance, or declare the object of the trust to be to make a provision for his support. They only operate to declare a distinct trust for the sole and only benefit of William Hamilton during his life. A trust may be so created that no interest rests in the beneficiary, as where it is limited to the support and maintenance of the beneficiary, and he is prohibited from alienation or anticipation. So where the increase is to be paid over only in the discretion of the trustee, or when it can only be applied for a special use, such as education or support. In all such cases the purpose of the trust would obviously be defeated if the beneficiary could assign or alienate. *But wherever the absolute, equitable interest is in the cestui que trust and there is no prohibition upon his power of alienation, the incidents of ownership attach, and such interest is assignable and alienable.* Perry, Trusts, Sec. 386a.

“It is difficult to see how this trust would be breached by an assignment by the beneficiary, upon sufficient consideration, of the rents accrued or to accrue in the hands of his trustee. These rents would in such case have been applied to ‘the only use and benefit’ of the beneficiary, just as certainly as if paid into his hands. The late cases, to which we have been referred, of *Lampert v. Haydel*, 96 Mo.



439, 9 S. W. Rep. 780, and *Smith v. Towers*, 69 Md. 77; 14 Atl. Rep. 497, and 15 Atl. Rep. 92, are not in point. In the first case the devise was 'for the use and benefit of my three sons, \* \* \* in equal shares, as long as they all may live, with power \* \* \* to use and enjoy equally the rents, issues and profits thereof during their natural life. \* \* \* My object in making the foregoing disposition of my St. Louis property, and in attaching the limitations aforesaid, is to secure to my children a certain annual income, beyond the accidents of fortune, \* \* \* and, with this end in view, to take away from them the power of disposing of the same, or of creating any liens thereon, or of making the same liable in any way for their debts.' This last clause operated to declare the trust to be one for the personal support of the beneficiaries and in express terms withheld all power of charging the trust by mortgage or assignment. The deed of one of the beneficiaries, by which he alienated his interest in the trust, was therefore properly held inoperative and void. The Maryland case was still less an authority. The beneficiary had made no assignment. The case was that of a creditor endeavoring by garnishment process to reach the fund in the hands of the trustee, to satisfy a debt due by the beneficiary. The trustee held under a will by which he was empowered to collect the rents and profits, and pay them to his son Robert, 'into his own hands, and not into another, whether claiming by his authority or otherwise.' The power of anticipation and alienation was thus expressly withheld. The trust was sustained, and the creditor properly repelled.

*"The legal title to the property conveyed, under the trust under consideration, being in the trustee, Henson, and the equitable interest in the beneficiary, Hamilton, and they having joined in a conveyance, operates to pass the estate for life to the mortgagee. The demurrer was properly sustained, and the decree affirmed."*

It will be noted that the reason the interest of the beneficiary could not be reached by a creditor through the instrumentality of a court of chancery was due to Sections 4282-4285, Code of Tennessee, which changes the common law. We think the language underlined applies equally to the case at bar.

In Lewin's Law of Trusts, page 692, the following appears:

*"It may be laid down as a general rule that an equitable interest may be assigned though it be a mere possibility, and that, either with or without the intervention of the trustee. And the assignee of the cestui que trust may call upon the trustee to clothe the equitable interest with the legal estate and on his refusal, may, by suit compel a conveyance without making the assignor a party."*

In *Perrine v. Newell*, 23 Atl. (N. J. Eq.) 493, the court said:

"McGill, Ch. The object of the bill is to secure the payment of \$1000 with interest, out of the farm hereinafter mentioned. By his will, dated on the 19th of June, 1859, James Newell devised to William Newell and Elijah W. Dunn his farm at Lower Penn's Neck, in the county of Salem, containing about 245 acres, whereon his son, Charles B. Newell, then lived, with other lands, in trust, to rent the same from time to time, and pay to Charles B. Newell, during his life, the rents and profits thereof, and continued in these words: 'And at the death of said Charles B. Newell, I do give and devise all these said lands, houses and premises to his three children, Eliza Bradway, Charles Newell, Deborah Tuft, his children; to them, their heirs and assigns forever.' On April 29, 1872, after the death of James Newell and after his will had been duly admitted to

probate, the son, Charles B. Newell, and his children Charles W. B. Newell, Eliza A. Bradway and Deborah Tuft, who were all then of age, in order to enable them to rebuild embankments along the Delaware river, upon which a portion of the farm fronts, to protect the farm from inundation, borrowed \$1000 from John Hershon, executing and delivering to him their bond conditioned for the payment of that sum in three years, with interest at 7 per cent per annum, and on the same day made and delivered to him their mortgage of the farm to secure the payment of that bond. In February, 1875, Hershon assigned the mortgage to John Perrine. Perrine died in April, 1886, leaving a will afterwards duly admitted to probate, of which the complainant is executrix. At the time of the execution of the mortgage Charles W. B. Newell was married. His wife still lives, and is a defendant to this suit. Eliza A. Bradway and Deborah Tuft were also, at the time of making the mortgage, married, and their husbands survive and are parties defendant in this suit. Neither the wife of Charles W. B. Newell nor the husbands of Eliza Bradway and Deborah Tuft joined in the execution of the bond and mortgage. The bill alleges the purpose for which the mortgage was given, and that the embankments were constructed with the moneys and from it, and that such work was necessary for the preservation of the farm, and it asks dual relief; that the mortgage may be foreclosed; also, that the money due upon it may be charged upon the farm and paid thereout. Only the trustees, William Newell and Elijah W. Dunn, answer; and they claim that complainant's right is subject to a lien upon the trust property which the law gives them for disbursements they have made in the performance of their trust, and allege that such disbursements amount to a large sum.

“The first question to be considered is whether the children of Charles B. Newell, at the time the mortgage was made, had an estate in the farm which they



could mortgage. It is observed that the will provides that the trust shall continue during the life of Charles B. Newell, adding and at the death of the said Charles B. Newell, I do give and devise, etc. In *Port v. Herbert's Ex'rs*, 27 N. J. Eq. 540, John Herbert, by his will, devised lands to his executors to hold in trust for the use of his son-in-law, Abraham Post, in order that Post might enjoy the possession, rents and profits of the lands until the youngest child of his wife should attain the age of 21 years, and 'after the said youngest child' should attain the age of 21 years, the land was to be sold and the proceeds of sale divided among the wife's children. Chief Justice Beasley, pronouncing the opinion of the court of errors and appeals, stated the rule to be that a bequest to A. 'at' a given age or marriage, or 'when' or 'from' and 'after' his attaining a given age, is *prima facie* contingent, but that the rule is subject to exceptions, which, with the rule, are very distinctly stated and explained by Vice-Chancellor Wigram in the case of *Peckham v. Gregory*, 4 Hare 398, in this language: 'If there is a gift to a person at twenty-one, or on the happening of any event, or a direction to pay and divide when a person attains twenty-one, there, the gift being to persons answering a particular description, if a party cannot bring himself within it, he is not entitled to take the benefit of the gift. There is no gift in those cases, except in the direction to pay, or to pay and divide. But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the court has commonly expressed it, for the benefit of the estate, the same reasoning has never been applied to the case. The interest is vested, notwithstanding, although the enjoyment is postponed.' Applying this rule to the case then considered, the chief justice said: 'Now, in the present case, it seems to me that the purpose of the testator in deferring the payment to the childrn of these legacies until the youngest should become of age is perfectly manifest. It was to keep the family together



and provide a house for all the children until the period of distribution. I am at a loss to perceive any other motive for this provision. The payment, most evidently, was not postponed on account of anything personal to the legatees. \* \* \* Without looking for the intention in other parts of the will, I think, from this clause alone, the purpose to postpone the payment of these legacies was solely for the convenience of the estate, and to let in the interest deposited in the son-in-law, is unmistakably shown.' The conclusion drawn was in affirmance of the chancellor's opinion (reported in 26 N. J. Eq. 278), that the children of the testator's daughter had taken vested interests at the testator's death. The doctrine thus laid down has been adopted in several other cases in this state. *Fairly v. Kline*, 3 N. J. Law 754; *Wintermute v. Snyder*, 3 N. J. Eq. 489; *Howell v. Green*, 31 N. J. Law 570; *Van Dyke v. Vanderpool*, 14 N. J. Eq. 198; *Feit's Ex'r v. Vanatta*, 21 N. J. Eq. 64; *Beatty's Admr. v. Montgomery's Ex'r*, Id. 324; *Van Blarcom v. Dager*, 31 N. J. Eq. 786; *Vallentyne v. Wood*, 42 N. J. Eq. 552, 9 Atl. Rep. 582; *Rhodes v. Shaw*, 43 N. J. Eq. 430, 11 Atl. Rep. 116.

"In the case now considered, it is apparent by the deferring possession under the devise to the children, the testator's purpose was to let in a trust estate for the life of their father. The life estate was guarded by a trust designed to secure its continuous beneficial enjoyment by the testator's son, who would naturally care for his children. For some reason, undisclosed by the will, the testator deemed it unwise to bestow any legal estate upon his son; and yet it is plain that he designed for him and for his children the benefits which would naturally flow from the fee—that is, the use of the land by the son for life in the maintenance of his family, and the remainder to the son's children. The assurance of this course by the testator was a mere arrangement for the convenience or safety of the estate. No reason appears, personal to the children of Charles,

why their interests should be postponed. I think that this case is clearly within the rule adopted in *Post v. Herbert's Ex'rs*, and that the children of Charles B. Newell, at the death of their grandfather, took a vested remainder in the fee in the farm subject to the trust estate for the life of their father. This being so, they could mortgage their interest.

*"In the next place it is too clearly established to need citation of authority that Charles B. Newell, as cestui que trust, could assign or mortgage his beneficial interest in his father's estate, subject, however, to such rights as the trustee may have in it. The father and children, then could give the mortgage in question."*

If the beneficiary under the above trust could have mortgaged his interest, we do not understand how it could be said that the beneficiary under the trust deed in consideration could not mortgage or assign his interest.

In *Debrell v. Carlisle*, 48 Miss. 709, the court says:

*"A cestui que trust may lawfully dispose of his estate, notwithstanding his title is contested by the trustee, for the latter can never disseize the founders of the trust estate; but so long as it continues the possession of the trustee is treated at least in a court of equity as the possession of the cestui que trust. Baker v. Whiting, 3 Sumner (U. S.) , 45 Fed. Cas. No. 787."*

*Sullivan v. Redfield*, Fed. Cas. 13957:

*"I consider it to be settled that an assignment by a cestui que trust of an equitable interest by way of a contingent remainder in either realty or personalty made for a valuable consideration, is effectual to pass the interest of the assignor, and substitute the assignee in place of the assignor as to all the*

*rights* which in any event might or would have accrued to the assignor.

“In *Varrik v. Edwards*, Hoff., Ch. 382, the vice chancellor reviewed the decisions on this subject and it is quite unnecessary to restate them here. I apprehend there has been no real question on this point for many years.”

*Tillinghast v. Bradford et al.*, 4 R. I. 205:

“The nature of the debtor’s interest in the trust property under his father’s will was an equitable estate for life, with a power of disposing of the remainder in fee by will; in default of such disposition such remainder to be conveyed to his heirs at law, there being also a clause in the will against anticipation and alienation of the rents and profits during the debtor’s life. It is quite clear that it was the intention of the testator to make an alimentary provision for his son during life which should give him all the advantages of an estate in fee without the legal incidents of such an estate—alienable unless by will, and subjective to the payment of the son’s debts. Such restraints, however, are so opposed to the nature of property—and, so far as subjectiveness to debts is concerned, to the honest policy of the law—as to be totally void unless included, which is not the case here, in the event of its being attempted to be alienated or seized for debts it is given over by the testator to some one else. This has been the settled doctrine of a court of chancery at least since *Brandon v. Robinson*, 18 Ves. 429, and an application to such a case as this is so honest that we would not change it if we could. Certainly no man should have an estate to live on but not an estate to pay his debts with. Certainly, property available for the purpose of pleasure or profit should be also amenable to the demands of justice.”



*Sparhawk v. Cloon*, 125 Mass. 263:

"J. Gray. At law, any property, rent or personalty that a man owns may be alienated by him, or may, unless specially exempted by statute, be taken for the payment of his debts; and no form of grant or devise can enable the grantee or devisee to hold the estate without its being subject to alienation, attachment and execution. Co. Set. 232a. Blackstone, *Bank v. Davis*, 21 Pick. 42.

"From the time of Lord Eldon the same rule has prevailed in the English Court of Chancery to the extent of holding that where the income of a trust estate is given to any person (other than a married woman) for life, *the equitable estate for life is alienable by and liable in equity to the debts of the cestui que trust, and that this quality is so inseparable from the estate that no provision, however expressed, which does not operate as a cesser or limitation of the estate itself can protect it from his debts.* *Brandon v. Robinson*, 18 Ves. 429; S. C. 1 Rose 197; *Rochford v. Hackulan*, 9 Hore 475; 2 Spense Eq. Juris. 89, and cases cited.

"The English doctrine has been approved in many decisions and dicta in this country. *Tillinghast v. Bradford*, 5 R. I. 205; *Melbane v. Melbane*, 4 Ire. Eq. 131; *Heath v. Bishop*, 4 Rich. Eq. 46; *Smith v. Moore*, 37 Ala. 327; *McIlvaine v. Smith*, 42 Misso. 45; *Sanford v. Lackland*, 2 Dillon 6; Seague, J., in *Nichol v. Levy*, 5 Wall. 433, 441.

"On the other hand it has been maintained by judges whose opinions are entitled to the highest respect, that the founder of a trust may secure the enjoyment of it to other persons, the objects of his bounty, by providing that it shall not be alienable by them or be subject to be taken by their creditors; and that his intention in this regard, *when clearly expressed by him*, must be carried out by the court."



*Hutchinson v. Maxwell*, 57 L. R. A. 387 (Virginia) :

“It is well settled in this country and in England, from which country we derive the principles of our jurisprudence, that a gift or grant of a beneficial estate, in fee or absolutely, whether legal or equitable, has certain legal incidents of which the estate cannot be divested, and all conditions adopted for that purpose are necessarily repugnant and void. Among those incidents are the donee’s or grantee’s power of alienating such estate, and its liability for his debts. Co. Litt. 223a; *Brandon v. Robinson*, 18 Ves. Jr. 429; 2 Minor, Inst. 4th ed. 287, 288; Gray, *Restraints on Alienation of Property*, 2d ed., sections 105, 134.

“The reason of this doctrine or principle is the repugnancy of such restraints upon the ordinary rights of property, and that property would thereby be withdrawn from the ordinary rules and channels of commerce and trade.

“In Co. Litt. 223a, in discussing conditions against alienation, it is said: ‘The like law is of a devise in fee upon condition that the devisee shall not alien, the condition is void; and so it is of a grant, release, confirmation or any other conveyance whereby a fee simple doth pass. For it is absurd and repugnant to reason that he hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien. And so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest or propertie therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and propertie is out of him, so as he hath no possibilitie of a reverter; and it is against trade and traffique and bargaining and contracting between man and man.’

“The case of a settlement upon a married woman, or in reference to coverture, is an exception, or apparent exception, to the general rule that conditions restraining the power of alienation and exempting property from the liability for the debts of the owner are repugnant and void. But the whole doctrine of the equitable separate estate of a married woman is the creature of equity—the invention of the chancellors—and sets at naught many of the principles of the common law. 2 Minor, Inst. 4th ed. 648.

“‘When this court,’ said Lord Cottenham in *Tullett v. Armstrong*, 4 Myl. & C. 377, ‘first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and, by another violation of the laws of property, supported the validity of the prohibition against alienation.’ *Buckton v. Hay*, L. R. 11 Ch. Div. 645.

“It is also well settled in England that the right of alienation and liability for debts are inseparable incidents of a life estate, whether limited by way of trust or otherwise, except in cases where there is a termination or limitation over of the estate dependent upon attempted alienation or seizure by creditors. *Brandon v. Robinson*, 18 Ves. Jr. 429; *Graves v. Dolphin*, 1 Sim. 66; *Rochford v. Hackman*, 9 Hare 475; Gray, Restraints on Alienation of Property, Section 134.

“It is also equally well settled in this country, even in those jurisdictions where ‘spendthrift trusts’ are upheld, that liability for debts is an inseparable incident of a legal life estate. In the case of *Hahn v. Hutchinson*, 159 Pa. 138, 139, 28 Atl. 167, in the

supreme court of Pennsylvania, where such trusts seem to have had their origin, it was held, following prior decisions, that, 'in order to protect the estate from creditors, the legal estate must be in the hands of a trustee, and, if the equitable estate became merged in the legal, it could be immediately seized in execution by creditors.' Prof. Gray, who has given this subject the most thorough investigation, in his work on Restraints on Alienation, says there is not a shred of authority on either side of the Atlantic in favor of the doctrine that a life tenant of the legal estate in land can be restrained from alienation. Sections 138, 134. In our investigation, we have found no case holding a contrary doctrine, unless it be some Illinois cases referred to by Prof. Gray. At least, the overwhelming current of authority is that a legal life estate is subject to the legal incidents of property, one of which is that it is liable for the owner's debts. *Ehrisman v. Sener*, 162 Pa. 577, 29 Atl. 719; *Wellington v. Janvrin*, 60 N. H. 174; *McCleary v. Ellis*, 54 Iowa 311, 37 Am. Rep. 205, 6 N. W. 571; *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. 376.

*"If liability for debts is an inseparable incident of a legal life estate, as it unquestionably is, why should it not be an inseparable incident of a like estate in equity?"* One reason why it is an inseparable incident of property at common law is that it is against public policy that a man 'should have an estate to live on, but not an estate to pay debts with.' Does not this reason apply as much to equitable estates as to legal? A restraint on alienation and freedom from liability for debt are as much against public policy in the one case as in the other. The English chancery courts recognized this, and applied the rule of the common law to equitable estates. They did not ingraft any new doctrine on the common law, as is suggested in some of the cases which uphold spendthrift trusts; but, as Prof. Gray shows conclusively, 'they walked scrupulously in the ancient ways of the law, and it is these late cases



which have departed from the principles of the common law as much as they have from the precedents in equity.' 'The common law,' as he says, 'held that legal estates of freehold, whether in fee simple or for life, should not be inalienable; and chancery held the same of equitable estates of freehold. The common law held that a legal life estate might be made determinable on alienation, and chancery held the same of an equitable life estate.' Section 256.

"Not only did courts of equity, in the furtherance of a wise public policy, recognize the fact that equitable as well as legal estates should not be withdrawn from commerce, and should be liable for the obligations of the owner, but at an early day, very soon after we had severed our connection with the mother country, the lawmaking power of this state, by an act regulating conveyances, which went into effect January 1, 1787, and which, with some verbal changes, is found in section 2428 of the Code of 1887, declared that 'estates of every kind, holden or possessed in trust, shall be subject to debts and charges of the persons to whose use, or to whose benefit, they are holden or possessed, as they would be if those persons owned the like interest in the things holden or possessed, as in the uses of trusts thereof.' 12 Hen. Stat., chap. 62, p. 157; 1 Rev. Code 1819, chap. 99, section 30.

"This statute makes the equitable estate of the *cestui que* trust liable for his debts to the same extent as if he were the legal owner of the same. If a condition is annexed to a legal life estate that it shall not be liable for the owner's debts, it is void. Why, then, is not a like condition annexed to an equitable life estate void also?

"The legislation of the state shows that it was the object and policy of the legislature to make all estates, where the owners are *sui juris*, liable for debt, whether legal or equitable, except such as might be exempt by express statutory provisions. The effect



of upholding spendthrift trusts would be to encourage idleness and lessen enterprise, and to foster a class who become more and more reckless and indifferent to their honest debts, from a sense that they are hedged in by the law beyond the reach of their creditors.

“The decisions of the American courts upon this question are conflicting, and the reasoning of the cases which uphold spendthrift trusts is unsatisfactory, and, as it seems to us, at war with well-settled principles of law as to the incidents of property, whilst the English courts of chancery, and the American cases which follow them, even if our statute did not make a debtor’s equitable property liable for his debts to the same extent as if he were the legal owner, seem to us to be sustained by the better reason, and in furtherance of a wise public policy. Whatever rights, whether legal or equitable, a person *sui juris* has in property, ought to be, and we think are, liable for his debts, except so far as is exempt therefrom by statute. Whatever rights of property the *cestui que* trust can demand from his trustees, his creditors ought to have the right to subject to the payment of their debts, unless his rights are so connected or blended with the rights of others that they cannot be subjected without prejudice to the latter’s rights. *Nickell v. Handly*, 10 Gratt. 336, 339.

“Having reached this conclusion, the provisions in the deed of Mrs. Maxwell must be held to be void in so far as they declare that the property rights which her husband acquired under the deeds shall not be liable for his debts.

“The next question is, What rights of property did the husband acquire by the deeds?

“By the first-mentioned deed, filed with the bill, and marked ‘Exhibit B,’ he acquired an absolute equitable estate in the horses and other personal property described in clause number 1 of that deed,

or in the proceeds thereof, in the event if the trustee sold the same, as he had authority to do under the provisions of the deed. Under that deed, and the other deed filed with the bill, marked 'Exhibit C,' he was entitled to what, in the judgment and discretion of the trustee, would be a proper and comfortable support and maintenance out of the rents and profits of the farm conveyed by the first-named deed, and out of the income, rents and profits of the property conveyed by the second-named deed, after paying taxes, insurance and necessary expenses of administering the trust, and which were made prior charges upon the profits and income received by the trustee from the farm and from the property conveyed by the other deed. And the husband was further entitled, under the provisions of the first-named deed, to the annual interest or income on so much of the rents and profits of the farm as were not necessary for the said proper and comfortable support and maintenance of the husband, and which the trustee was required by the deed to invest as a capital sum or interest-bearing fund.

"We are of opinion, therefore, that the appellants have the right to have subjected to the payment of their debts, so far as may be necessary, the horses and other personal property conveyed by clause numbered 1 of the deed marked 'Exhibit B,' and filed with the bill, or the proceeds thereof, if that property has been sold by the trustee, and so much of the rents, profits and income derived by the trustee from the other property conveyed by, and also the fund invested under, the two deeds, after paying the prior charges of taxes, insurance, etc., charged thereon, as the husband would be entitled to receive for his proper and comfortable support and maintenance under the provisions of the said deeds.

"It is true, there is a discretion vested in the trustee by the deeds as to what amount of the rents, profits and income arising from the property conveyed shall be applied to the husband's support and

maintenance; but it seems to be settled that where trustees are directed to apply the income of a trust fund for the support and benefit of the debtor, and for other purposes, but have no right to exclude the debtor, then the assignee and the creditors can claim from the trustee the amount which the debtor could have claimed should have been applied to his benefit. *Page v. Way*, 3 Beav. 20; *Kearsley v. Woodcock*, 3 Hare 185; *Rippon v. Norton*, 2 Beav. 63; *Wallace v. Anderson*, 16 Beav. 533; and *Gray, Restraints on Alienation of Property*, 159."

It is conceived that the foregoing decisions coming as they do from courts of eminent standing all over the country will be given considerable weight. These cases hold that even in the trust deeds where the trustee has an active duty to perform, the *cestui que* trust may (1) alienate his interest whatever it may be and that it is liable for the payment of his debts, and (2) that the assignee is substituted in the place of the *cestui que* as to all the rights which in any event might or would have accrued to the beneficiary.

We think we are justified in concluding that the act of the *cestui que* trust in the case at bar of going into possession at the time the outstanding lease expired was a sufficient exercise of his discretionary right to reside upon the premises and use them for grazing or agricultural purposes. Further, in determining what interest the beneficiary took, the fact that aside from the question of whether it was an active or passive trust, Davis was clothed with the exclusive equitable title together with the right

of possession—thus being able to maintain ejectment even against the trustee, must not be lost sight of.

Assuming the trust was active, the assignee Sumner having gone into possession as soon as the transfer was made, and having succeeded to all Davis' rights in so far as his interest would be concerned, we maintain that no act of the purported trustee could affect his right whatever.

Assuming the trust was active, the conveyance made by Davis to his assignee Sumner carried with it *the right to possession to an undivided one-half; hence the trustee had no right to deal with the property so conveyed and could give no title.* Or perhaps it could be said to be a voidable one at most. The burden, however, would be on the defendant in error to show the act of the trustee was subsequently ratified by Sumner.

It would follow if the trust was active or passive, the defendant in error has failed to show he has the right to possession against the plaintiff in error, because he has failed to show a conveyance of that right from the owner thereof.

It follows that the evidence sought to be introduced by the plaintiff in error ought to have been received, as it tended to show that the defendant in error had no title to the premises set out in his complaint.



## III.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN HOLDING AND DECIDING THAT NO ERROR HAD BEEN COMMITTED BY THE TRIAL COURT AS ALLEGED IN THE FOLLOWING EIGHTEENTH ASSIGNMENT OF ERROR:

"18. That the court erred in sustaining the objection of plaintiff to and rejecting the offer of the defendant of a certain mortgage from Robert Wyllie Davis and wife to John K. Sumner, dated January 2, 1906, and recorded on March 4, 1908, in the office of the Registrar of Conveyances of the Territory of Hawaii, in liber 303, at page 91, whereby the said Robert Wyllie Davis conveyed by way of mortgage to the said John K. Sumner an undivided one-half interest in and to the land of Mokapu.

"Plaintiff's objection was that this evidence was incompetent, irrelevant and immaterial, and that defendant was estopped from introducing such mortgage in evidence."

The defendant in error advances the same argument under the above point as advanced under point III.

## IV.

THAT THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN ITS JUDGMENT AFFIRMING THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT OF THE TERRITORY OF HAWAII,

FOR THE REASON THAT SAID JUDGMENT WAS AND IS CONTRARY TO THE EVIDENCE AND THE LAW.

Under the above specification of error the plaintiff in error makes the following points:

(a)

That the judgment entitles the defendant in error to a paid up lease, while the evidence shows his interest is subject to the rents and other conditions which are contained in the lease.

An examination of the lease under which the defendant in error claims shows clearly that the defendant in error's interest is subject to the payment of rents, taxes, assessments and all other covenants in the lease which is attached to the defendant in error's complaint and marked "Exhibit A."

The defendant in error did not introduce any evidence relative to the payment of rent. In view of the fact that (under the theory that the trust was active) the plaintiff in error was the equitable owner of the premises and entitled to the rents thereof, we fail to understand upon what theory it could be said that the defendant in error was entitled to a paid up lease as against the plaintiff in error.

In *German Am. Sav. Bank v. Gollmer*, 155 Cal. 684, the owner of a leasehold interest sought to have its claim quieted and the judgment failed to contain some of the stipulations of the lease which plaintiff's

claim was subject to. The court used the following language:

“By its decree the trial court adjudged that the plaintiff was the owner of the leasehold interest described in the complaint, subject, only, to the payment of said rents, and the covenant for the payment of increased taxes, and that such estate for years so owned was not subject to any condition, covenant, agreement or obligation. \* \* \*

“Assuming for the moment that all the findings of the trial court are sufficiently sustained by the evidence, the judgment was nevertheless too broad in its terms, and is not entirely supported by the findings. As we have seen, it is claimed therein that the plaintiff is the owner of the leasehold interest described, subject only to the payment of said stipulated rents and the covenant for the payment of increased taxes and free from all other conditions, covenants, agreements and obligations imposed by the instrument constituting the lien. There were obligations imposed upon the lessee by this instrument and those specified in the judgment, such as the provision that no business other than the banking business or some class of business for the carrying on of which a stipulation had already been made, could be conducted on the demised premises without the consent, in writing, of the lessor. The only supposable theory which a judgment freeing the lessee from this and other obligations imposed by the lease could rest is the one suggested by the plaintiff, viz., that the consent to the assignment not only disposed with but put an end to the difficulty forever, leaving the assignee free to again assign without consent, etc. *It follows that assuming the findings to be sustained by the evidence, the judgment should have gone no further than to decree the plaintiff to be the owner of the leasehold interest, subject to all the conditions, covenants, obligations and stipulations contained in the lease, save and except the single*

*condition against assignment.* We have said this much as to the form of the judgment only for the guidance of the parties in further proceedings in the case, as the judgment must be reversed for another cause.”

We believe that the reasoning advanced in the above citation applies to the case at bar. No doubt the judgment should have decreed (under the theory of the trial court) that the defendant in error’s claim in the land was subject to the conditions of the lease under which his rights were based. It follows that the judgment is contrary to the law and contrary to the evidence, for the reason that it entitles the defendant in error to a paid up lease.

(b)

That the court should have decreed the interest of the plaintiff in error to the premises set out in the defendant in error’s complaint.

Under the theory that the trust was active, the evidence introduced by the defendant in error showed that the plaintiff in error’s title to an undivided half of Mokapu was as good as the defendant in error’s. It showed that the plaintiff in error was the equitable owner of all the property contained in the lease which was set out in the defendant in error’s complaint. During the trial of the within action, counsel for the defendant in error made the following statement relative to the title of the plaintiff in error in and to the subject matter of the within action:



“We admit that Robert Wyllie Davis took a half of our term of years, twenty-five (25) term of years.”

In explaining the above admission, counsel for the defendant in error used the following language in his brief filed in the Supreme Court of the Territory of Hawaii on the 11th day of January, 1915:

“We have admitted that the defendant is entitled to an undivided one-half of the twenty-five (25) year term granted June 1, 1910. But we insist that the plaintiff is entitled to the remaining one-half interest in said term, which we have proved that the plaintiff owns through the conveyance of the said last remaining one-half of the said term of years unto the said plaintiff Harrison.”

As the within action was brought for the purpose of determining the adverse claim of the plaintiff in error, the decree should have set out his interest in and to an undivided one-half of the land of Mokapu.

As was said in *Kahoiwai v. Limeau*, 10 Haw. 507:

“The plaintiff by the statute, may proceed against any person who claims adversely and *whose claim he desires to have determined.*”

In *Pennie v. Hildreth*, 22 Pac. (Cal.) 398, the Supreme Court of California used the following language in an action brought under a similar section:

*“If the defendant had an equitable title to one-half of the property in controversy whether that interest was subject to the mortgage of the plaintiff, or paramount to it, he had a right to have it so decreed and the interest of the plaintiff so declared; and a judg-*

*ment against him on demurrer that he had no right, title or interest in the property would have been erroneous if the answer had been sufficient in other respects."*

Could it be argued that the plaintiff in error having failed to set out his claim in his answer he is not entitled in this action to have the same decreed?

Under the Hawaiian decisions a defendant may prove his claim, without specially pleading it under an answer of a general denial.

In *Hakalau Plantation Co. v. Kahuena*, 14 Haw. 189, the question was presented as to whether or not a defendant could prove title to the land in controversy under the general denial. The court had the section of the Revised Laws under which the within action was brought under consideration and used the following language:

"But under our statutes, need they amend their answer in order to set up an adverse claim? It may be the better doctrine or the better practice, that defendants should be required, as is often held under other statutes elsewhere, to set forth in their pleadings in actions of this kind their adverse claims in order to be permitted to prove them at the trial, and perhaps this would be a proper subject for a rule of court, but in our opinion it is not necessary to do so under our statutes. The statute which provides for actions of this kind does not, in terms require it (any more than the statute that relates to ejectment), although it provides that if the defendant disclaims or suffers judgment to be taken against him without answer, the plaintiff shall not recover costs—a very natural and proper provision in a statute of this kind. But there is nothing expressly requiring a

defendant to set forth his claim affirmatively in his answer. True, this is so, also, in most statutes of this kind elsewhere, but where an affirmative plea has been held necessary elsewhere, the code pleading has prevailed, law and equity proceedings have been united, and proceedings of this kind have been treated largely as recognitions of former equity proceedings. With us, the distinction between law and equity procedure has been maintained, actions to quiet title have been regarded as purely actions at law, and what is of special importance in any law case, the answer under our statute may be a general denial under which 'any matter of law or fact whatever' may be given as a defense. This provision has been regarded as applicable to all law cases, and in the absence of any provision to the contrary we feel obliged to hold it applicable to actions to quiet title.

\* \* \* As shown above, it has been held repeatedly in that state that defendants in actions of this kind need not set forth their adverse claims in their answers for the reason that they can present any defense under the general denial."

## CONCLUSION.

In conclusion the attention of the court is called to the four separate grounds hereinafter set forth, any one of which we believe to be sufficient to secure a reversal of the judgment of the Supreme Court of the Territory of Hawaii.

In brief, these grounds are:

1. That the Supreme Court of the Territory of Hawaii erred in affirming the action of the Honorable W. L. Whitney, Second Judge of said circuit court, in denying the motion of the defendant in said action, plaintiff in error, for a judgment of non suit,

for the reason that the statute of uses executed the use.

2. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court, as alleged in the following seventeenth assignment of error :

“17. That the court erred in sustaining the objection of plaintiff to and rejecting the evidence offered by defendant of a deed from Robert Wyllie Davis and wife to John K. Sumner, to an undivided one-half interest in the land known as Mokapu, dated January 1, 1906, and recorded on March 4, 1908, in liber 302, on page 192.

“Plaintiff’s objection was that it was incompetent, irrelevant and immaterial and defendant was estopped from introducing any such deed in evidence.”

3. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that no error had been committed by the trial court as alleged in the following eighteenth assignment of error :

“18. That the court erred in sustaining the objection of plaintiff to and rejecting the offer of the defendant of a certain mortgage from Robert Wyllie Davis and wife to John K. Sumner dated January 2, 1906, and recorded March 4, 1908, in the office of the Registrar of Conveyances of the Territory of Hawaii, in liber 302, at page 91, whereby the said Robert Wyllie Davis conveyed by way of mortgage to the said John K. Sumner an undivided one-half interest in and to the land of Mokapu.

“Plaintiff’s objection was that this evidence was incompetent, irrelevant and immaterial, and that de-



fendant was estopped from introducing such mortgage in evidence."

4. That the Supreme Court of the Territory of Hawaii erred in its judgment affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, for the reason that said judgment was and is contrary to the evidence and the law.

It is therefore most earnestly urged by counsel for plaintiff in error that in the light of the decisions cited in the within brief and the manifest error of the lower court both in refusing to admit the evidence offered by plaintiff in error and failure to decree the plaintiff in error's interest in and to the subject matter, this court will reverse the case with such direction as justice and the law may require.

Respectfully submitted,

Dated April 10, 1916.

E. C. PETERS,

R. J. O'BRIEN,

Attorneys for Plaintiff in Error.

No. 2633

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

ROBERT WYLLIE DAVIS,  
*Defendant, Plaintiff in Error,*

VS.

FRED HARRISON,  
*Plaintiff, Defendant in Error.*

In Error to the  
Supreme Court of Hawaii.

**BRIEF FOR DEFENDANT IN ERROR.**

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*Attorneys for Defendant in Error.*

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*Filed this*.....*day of April, 1916.*

*FRANK D. MONCKTON, Clerk.*

*By*.....*Deputy Clerk.*



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**BRIEF FOR DEFENDANT IN ERROR.**

**Supplemental Statement of Facts.**

For a succinct statement of the facts herein involved, up to the point where the defendant in error, the plaintiff below, rested his case and the plaintiff in error, defendant below, interposed a motion for nonsuit, which was granted by the trial court, but said ruling afterwards reversed on appeal, this court is referred to the decision reported in 22 Hawaiian at pages 52 and 53.

Upon the resumption of the trial below, and after plaintiff in error's motion for nonsuit had been denied, in accordance with said decision, the plaintiff in error offered in evidence a deed from himself to Sumner of an undivided one-half of all his interest in the land of Mokapu and a mortgage to Sumner of the remaining



one-half interest in said land, said deed and mortgage being dated, respectively, January 1 and 2, 1906, almost 3-1/2 years prior to the creation by Holt, trustee, of the leasehold interest to an undivided one-half of which defendant in error seeks to quiet his title. Plaintiff in error further offered in evidence certain oral testimony (by himself) on the nature of the alleged residence on and possession of the land of Mokapu by the said Sumner pursuant to the deed and mortgage aforesaid. To the admission of this evidence defendant in error objected, but, the court reserving its ruling and the evidence being received subject to said objections, the defendant in error, in his turn, put in evidence certain testimony of A. V. Gear, on the same matters covered by plaintiff in error's said testimony, to wit: the nature of Sumner's alleged residence on and possession of Mokapu pursuant to the transfers of January 1 and 2, 1906, aforesaid.

At the conclusion of all the evidence the trial court ruled that said documentary and oral evidence should be excluded and in its final decision we find the following reasons advanced for that action:

“The defendant, on the resumption of the trial of this cause after the judgment of nonsuit was vacated, offered in evidence, over plaintiff's objection, a deed of an undivided one-half of the land of Mokapu from defendant and his wife to John K. Sumner, dated January 1, 1906, and recorded in Liber 302 at page 192 of the Hawaiian Registry of Conveyances; and a mortgage of an undivided one-half of said land from defendant and his wife to the said Sumner, dated January 2, 1906, and recorded in Liber 303 at page 91 of said Registry.

The court reserved its ruling on the admissibility of said documents.

Defendant then offered *certain oral evidence* as to the transfer of defendant's interest under said documents and on the nature of the alleged residence on and possession of the land of Mokapu by the said Sumner pursuant to said transfers.

Defendant then having rested without offering any other substantial evidence, and the matter of the admissibility of said evidence having been argued at length and taken under advisement, by the court, the court ruled, in open court on June 23rd, 1914, at a further hearing of the above entitled cause, that *said documents*, constituting evidence solely of title in a stranger and not tending in any manner to show in *defendant* a title in and to the land of Mokapu equal or superior to that of plaintiff, were inadmissible in evidence, as well as the *oral evidence* of residence on or occupation of Mokapu by the said Sumner, for the same reasons."

Transcript, pp. 78, 79.

The court then held that, the evidence thus excluded constituting substantially the entire case for the defendant, plaintiff in error, the said defendant had not rebutted the *prima facie* case made out by the plaintiff and judgment was accordingly ordered entered in favor of the plaintiff (defendant in error). This judgment was thereafter affirmed by the Supreme Court of Hawaii by its decision reported in 22 Hawaiian at pages 465-469.

We deem it essential to a correct understanding of the issues herein involved to present the foregoing facts to this court in addition to the facts recited in

22 Hawaiian 52, and those set out in plaintiff in error's brief.

Let it be further noted that the relief prayed for in the bill of complaint below, as the same was amended before entry of judgment by the trial court, was as follows:

“WHEREFORE plaintiff prays: That defendant may be required to set up any adverse claim which he may have in and to said undivided half of said term of years in said land; that defendant be forever barred from all claim and/or interest in said described undivided half of said term of years; that *the title to said undivided half of said term of years may be quieted and the plaintiff's ownership therein may be confirmed*, and that plaintiff be awarded his costs herein.”

Transcript, pp. 98, 99.

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### Argument.

#### CONTENTIONS OF PLAINTIFF IN ERROR.

As we gather from the brief, the contentions of plaintiff in error, are as follows:

#### Point I.

The Sumner trust deed (dated August 16, 1892) created a merely passive trust which was executed by the Statute of Uses—so that, the trust deed being thus executed as to this life estate of plaintiff in error, the trustee had no power to create any leasehold interest during said life term, and the term of years under which defendant in error claims was invalidly created.

## Points II. and III.

Assuming that the trust was active, and the Statute of Uses does not apply:

(1) The interest of the beneficiary Davis was assignable.

(a) As to his interest in the rents and profits for his life;

(b) As to his right to reside on the land and, while so residing, to use the same for grazing and agricultural purposes.

(2) The deed of January 1, 1906, and the mortgage of January 2, 1906, vested in Sumner, as assignee of plaintiff in error, the title and rights theretofore held by the plaintiff in error and the trustee had no power to negotiate the 25-year term in question.

## Point IV.

The judgment of the trial court, as affirmed by the Supreme Court of Hawaii, was erroneous in that:

(a) The same erroneously awards to defendant in error a *paid up* lease;

(b) Said judgment fails to decree to the plaintiff in error a specific interest in the premises described in the bill of complaint.

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 POINT I.

## STATUTE OF USES.

It is to be noted that of the five distinct grounds upon which plaintiff in error based his original motion



for nonsuit, all have been abandoned save one, the third ground thereof, to wit: that the Statute of Uses had executed this trust. The point originally made that the nonsuit should have been granted because defendant in error had failed to deraign title from the Government, and the further point that no evidence was submitted satisfactorily accounting for the termination of the outstanding lease referred to in the Sumner trust deed (which points are fully reviewed in the Supreme Court decision in 22 Hawaiian, pages 51-59) are no longer urged and the decision of the Hawaiian Supreme Court on these points was evidently acquiesced in as sound.

On this point, as to the operation of the Statute of Uses, we are familiar with the law which uniformly applies the statute when the trust in question is an absolutely dry or naked trust, the beneficiary being, to all intents and purposes, the owner of the trust *res* with all its incidents, and the trustee having no function to perform save that of holding the dry title. The citation from *Perry on Trusts* and the two decided cases cited on this point by plaintiff in error correctly state the law in this regard.

However, the general law is well settled and the rule is entirely crystallized in Hawaii, that trusts which are in any sense active are not within the purview of the statute; and the case at bar presents a typical instance of a trust which imposes upon the trustee the active duty not only to hold the title and effectuate leases, and pay the income therefrom to the beneficiary, but further to stand ready to surrender the possession

of the land to the beneficiary, upon reasonable demand, for occupation for grazing or agricultural purposes only, and the unquestioned duty to interfere with the possession of said beneficiary, when once thus assumed, if that possession becomes one for any other purpose than the distinct purposes provided for.

The leading Hawaiian case on this subject is *Kidwell v. Godfrey*, 14 Hawaii 138. In that case land was left in trust to keep and preserve for the benefit of the *cestui* and "subject to such further instructions" as the said *cestui* might give to the trustee in writing duly acknowledged. It was held in this case that although one of the "instructions" which the *cestui* might give, might be the instruction to convey the fee, nevertheless the trust was *not* a mere passive trust upon which the Statute of Uses would operate, but that inasmuch as the trustee *might* have further duties to perform such as the duty of collecting and applying the rents and profits, or might be compelled to convey to another, the legal title remained in the trustee.

As the court says:

"Whether or not the Statute of Uses is in force in this Territory we need not say. *The trust in question is not one within the operation of the statute. The object of the trust was to keep and preserve the estate for a time subject to such directions as the grantor might give, one of which directions might be, to convey if requested, and to otherwise do as directed, and the full performance of the duty made it necessary that the legal title should be in him.*

"Therefore, if any agency, duty or power be imposed on the trustee, as by limitation to a

trustee and his heirs, to pay the rent, or to convey the estate, or if any control is to be exercised or duty performed by the trustee in applying the rents to a person's maintenance, or if the purpose of the trust is to protect the estate for a given time, or until the death of someone, *in all these and in other like cases, the operation of the Statute is excluded and the trusts or uses remain mere equitable estates."*

*Kidwell v. Godfrey*, 14 Hawaiian at p. 140.

See also

*Estate of Boardman*, 5 Hawaiian 146.

In our case it is obvious that the duties which the trustee might be called upon to perform were more than those resting on the trustee in *Kidwell v. Godfrey*, *supra*.

The limitations of our trust are as follows:

"To pay the rents, issues and profits arising from or out of the said land to my nephew Robert Wyllie Davis during the term of his natural life or in the discretion of said Robert Wyllie Davis to *permit him to reside* upon said premises and while so residing to use the same for *grazing and agricultural purposes.*"

Transcript, p. 225.

And then, upon the death of the *cestui que* trust the further duty was imposed upon the trustee to convey the premises to certain specified persons.

As the Hawaiian Supreme Court has well said:

"The trust under consideration was, after the termination of the lease referred to in the deed, to pay the rents, issues and profits to Davis for life or in the discretion of Davis to permit him to reside upon the land and while so residing to use it for

grazing or agricultural purposes. The right was not granted to Davis to use the land directly for the remainder of his life, but only during the period or periods when he might see fit to reside on it; nor was the right given him even during these periods of residence to use the land for any and all legitimate purposes. Both the time and the manner of the use were restricted. It is obvious that one of the purposes of the trust was to protect the estate even as against Davis himself at least until the death of Davis, and thereafter to convey the remainder to those entitled under the terms of the instrument. Even as to the interests of Davis, this was not a mere passive trust. The trustee had active duties to perform for the protection of the property and the trust as to Davis is not within the operation of the statute."

*Harrison v. Davis*, 22 Hawaiian at p. 57.

We submit that, under plaintiff in error's own authorities, the general law and the settled Hawaiian rule, the Statute of Uses does not apply to the case at bar.

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## POINTS II. AND III.

### **DID THE COURT PROPERLY REJECT THE DEED OF JANUARY 1, 1906, AND MORTGAGE OF JANUARY 2, 1906, AS INADMISSIBLE?**

As pointed out in our "Supplemental Statement of Facts", the trial court received in evidence the deed and mortgage above referred to, subject to defendant in error's objections, and later, after considering said documents in the light of all surrounding evidence, ruled said documents out, at the same time excluding all oral evidence touching the same, on the ground that



the said documentary and oral evidence was incompetent, irrelevant and immaterial. The Supreme Court of Hawaii, in its decision in 22 Hawaiian, at 465, after considering said documents, and carefully reviewing the oral evidence concerning the same (all of which was before that court, in the full record of the proceedings and testimony below) decided that the exclusion of said documents was proper because they merely furnished possible evidence of *title in a stranger to the record*, and had no bearing on any claim of title in the plaintiff in error as to the undivided one-half interest for a term of years which defendant in error sought to have quieted in himself.

The broad question before the court is the following:

*Was plaintiff in error entitled to put in evidence a deed of one-half his interest in Mokapu and a mortgage of the remaining one-half of his interest therein, both executed to Sumner in January, 1906, under the theory that these documents would vest in Sumner, as assignee, all the beneficial rights, and title theretofore owned by the plaintiff in error; and further claim that Sumner, by electing to reside on Mokapu exercised an election as beneficiary which prevented the trustee from validly creating the lease of June 1, 1910?*

In answering the above question in the negative, we urge the inadmissibility of said documents on the following grounds:

(a) Said assignments were merely *security assignments* and could not operate to divest the plaintiff in error of his beneficial interest in Mokapu;

(b) Even if said assignments were absolute, and operated to vest in the assignee Sumner the right to occupy Mokapu, this right of occupation was not exercised by said assignee and the lease by the trustee is valid and may not be forfeited;

(c) Furthermore, the rights to rents and profits are all that were assignable, and the lease by the trustee was validly made;

(d) Aside from all else, the plaintiff in error, having signed the lease of June 1, 1910, by way of consent, *is estopped* to claim an earlier assignment of his interests and to put in evidence these documents purporting to show such assignment.

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(A)

The deed of January 1, 1906, as well as the mortgage of January 2, 1906, was a mere "security assignment"; no absolute title was intended to be conveyed by either instrument and plaintiff in error therefore continued as the active beneficiary of the trust exactly as before, except only that Sumner had the right to the rents and profits of Mokapu as security for, and to be applied to satisfying, advances loaned to plaintiff in error.

That the deed of January 1, 1906, was a mere security assignment is gathered from the following testimony of the witness Gear.

This witness after stating that he and Sumner had entered into a partnership on Mokapu to raise pigs and a large loss had resulted, stated:

“He stated that he \* \* \* *had given security* to cover the amount of the loss \* \* \*

I know he executed a *mortgage and a deed*—I believe a *deed and a mortgage* both, but I don’t know the details excepting \* \* \* It is hazy \* \* \*

Q. Was there anything you can recall as being said by Mr. Davis with regard to the deed?

A. No; nothing that I heard from Mr. Davis would lead me to think he had done anything more than to give Sumner security.”

Transcript, pp. 191, 192.

The same witness elsewhere stated that he was present at an interview between the plaintiff in error and his wife and Sumner in August or September, 1909, at which interview it clearly appeared that neither the plaintiff in error nor Sumner considered that the deed and mortgage of January, 1906, had vested in Sumner all of the plaintiff in error’s rights and all his interest as beneficiary under the trust deed; because we find Sumner proposing that plaintiff in error deed to him, Sumner, the land of Mokapu, and the plaintiff in error objecting to this proposition; all of this clearly showing that neither party had any idea that the deed and mortgage of January, 1906, vested in Sumner all of the plaintiff in error’s rights.

“Mr. Sumner asked Mr. Davis and his wife to deed to him the land of Mokapu, and Mr. Davis and his wife both objected, and his wife got especially put out and angry over it—at the idea of asking them to deed the land to him, and they left.”

Transcript, p. 190.

Finally to remove all doubt, the plaintiff in error himself, in his answer in the equity partition suit of

*Cecil Brown, Trustee, v. R. W. Davis* (in evidence herein: See Transcript, pp. 304-313), admits himself out of court on this point in the following language:

“And by way of further answer to the allegations of paragraph three of said Bill of Complaint, contained, this respondent alleges and avers that heretofore and on to wit, the 1st day of January, A. D. 1906, this respondent Robert W. Davis for a good and valuable consideration did grant, bargain, sell and convey to the said John K. Summer an undivided one-half share or interest in and to the land and premises known as ‘Mokapu’ and ever since said last named day said John K. Summer has been and now is the owner and holder thereof subject to a defeasance of the legal title in the said John K. Summer and the reconveyance thereof by him to this respondent at any time on or before January 2nd, A. D. 1916, upon the payment to the said John K. Summer of the sum of \$2,794.93 with interest from the 1st day of January, A. D. 1906, to the date of reconveyance at the rate of seven per cent. per annum, and thereafter and on to wit, the 2nd day of January, A. D. 1906, this respondent conveyed by way of mortgage to the said John K. Summer an undivided one-half share and interest in and to said land and premises known as ‘Mokapu’, and said mortgage is in full force and effect and not satisfied or discharged.”

Defendant’s Answer in Equity No. 1828, Tr. p. 309.

Accordingly, these two assignments, being merely security assignments and the date for reconveyance as limited in the deed (January 2, 1916) not having arrived, and the mortgage not having been foreclosed, Summer appears merely as having a security title in the plaintiff in error’s interest in Mokapu. The trustee, after said transfers were executed, was still



liable to pay the rentals to the plaintiff in error, and still under the duty to permit him to reside on the land or, in the alternative, to effectuate leases on said land and pay the rentals realized over to him. These duties, it must be assumed, the trustee has properly discharged; and when we find the lease to Gear of June 1, 1910, duly executed by the trustee and signed by plaintiff in error (See 22 Hawaiian, at top of page 58) by way of consent thereto, it is clear that Gear acquired a valid leasehold interest and that the defendant in error, taking by mesne assignments from Gear, has a valid title to an undivided one-half of such leasehold interest.

(B)

**Even if the two conveyances in question were not security assignments but intended to pass an absolute title, and assuming that Sumner succeeded to all of plaintiff in error's beneficial rights, the right to reside on Mokapu was not actively exercised by Sumner for a long period prior to the creation of the lease of June 1, 1910, nor at the time said lease was created; and since its execution Gear and the defendant in error have been in peaceable possession of the leased property without interruption by Sumner. Therefore, the lease was properly and validly created and validly subsists at the present time.**

It will be recalled that the trust deed vested in the beneficiary the right *either* to rentals from the land if leased to a stranger *or* the right to reside on the land and use the same for grazing and agricultural purposes. As the Hawaiian Supreme Court has said:

“The trust under consideration was, after the termination of the lease referred to in the deed, to pay the rents, issues and profits to Davis for life or in the discretion of Davis to permit him *to reside upon the land and while so residing* to use it for grazing or agricultural purposes. The right was not granted to Davis, to use the land directly for the remainder of his life, but only during the period or periods when he might see fit to reside on it; nor was the right given him even during these periods of residence to use the land for any and all legitimate purposes. Both the time and the manner of the use were restricted. It is obvious that one of the purposes of the trust was to protect the estate *even as against Davis himself* at least until the death of Davis, and thereafter to convey the remainder to those entitled under the terms of the instrument.”

22 Hawaiian at p. 57.

So that it is clear that *unless* the beneficiary was openly residing on Mokapu and using the land for the purposes named, and thus deriving that particular advantage from the estate, the trustee would be under the duty of leasing the property to some stranger in order to realize an income therefrom.

It is clear from all the evidence, that if Summer ever resided on Mokapu within the meaning of the trust deed, it was for no more than approximately a year after January, 1906. Plaintiff in error himself gives this impression. He first says that Summer lived at Mokapu for about a year after the transfers in question, and then he became sick and left Mokapu and went up to Honolulu.

“Q. After he became a little better and began visiting Mokapu again, from that time to the time

when Gear took his lease, his visits to Mokapu were just occasional visits and his home was in Kalihi?

A. His home was in Kalihi, yes—when he was in town.”

Transcript p. 176.

“Q. After that” (i. e., after the sickness when he left Mokapu) “he made his home at Kalihi, except he made visits to Mokapu?”

A. Kalihi has always been his home when he is in town. Of course when he goes to the country, he makes his home at Mokapu. He has that Mokapu as a sort of resort and goes down to look at a few pigs and that way.”

Transcript p. 175.

This shows no residence on Mokapu by Mr. Sumner, but it shows quite the contrary. A land owner may have property in various places with a manager living on every distinct piece of land, but that by no means establishes the fact that such owner “resides” on every distinct parcel of land. He must do his *own* residing, for himself, and Sumner was confronted with the same physical necessity. The plaintiff in error did not and could not “reside” on Mokapu for Mr. Sumner.

As to the legal intent and meaning of the word “residence”, showing that the same means a physical and personal presence, note the following:

*Wright v. Genesee Cir. Judge*, 117 Mich. 24.

Intention to make a place a real home is necessary:

*Withorn v. Thomas*, 49 E. C. L. I.;

*Wrings v. Green*, 52 Vt. 204, 208.

Residence means “permanent abode”:

*Brookover v. Kase*, (Ind.) 83 N. E. 524.

One cannot be a resident of *two* places at the same time:

*Robinson v. Morrison*, 2 App. Cas. (D. C.) 105, 124.

But we find the defendant further testifying as follows:

“Q. And you were down in charge for him (Mr. Sumner) all that time?

A. Well, in charge for myself, too.

Q. What do you mean by that, ‘in charge for myself, too?’

A. I got an interest in the place. I was planting. I was raising a few stock for agricultural purposes, I was doing so all the time up to the time Gear got in. As I stated when I was planting melons Gear came along with a bunch of Caravonica cotton seed and wanted me to plant it in between the vines.”

Transcript pp. 176, 177.

Counsel for plaintiff in error on the trial below exerted himself to the utmost to cause plaintiff in error to say that A. V. Gear’s residence on Mokapu was also a residence for Mr. Sumner. Defendant, however, furnished no testimony of any weight whatsoever along this line. In reply to the question of “what was Gear doing over there?” which his counsel intended that he answer by the statement that Gear was there as agent for Sumner and occupying Mokapu for Mr. Sumner, defendant stated:

“When he came over there as I stated, he brought this cotton seed over and told me to plant it and I did so.”

Transcript p. 178.



“Q. Now when Mr. Gear was over there attending to this cotton, did he sleep on the premises?

A. He asked if he could have a room in my house and I said yes.

Q. During what period of time, how long did he raise cotton and live on the premises?

A. He was over to our house for a few months and moved over across to the place where they ginned the cotton.

Q. And that was during the time he was agent for Mr. Sumner?

[It will be seen how desperately this witness needed leading.]

A. That was during the time he was agent for Mr. Sumner.”

Transcript p. 178.

This evidence is clearly not evidence that Sumner was occupying Mokapu as a residence. Whatever it tends to show, it utterly fails to show that fact. So that it is apparent, even from the plaintiff in error's testimony, that Sumner himself was not residing on Mokapu for more than a few months after the transfers of January, 1906, and it appears further that neither the plaintiff in error nor Gear was doing the impossible task of maintaining Sumner's residence on Mokapu for him. The plaintiff in error himself, does not anywhere unequivocally say that Sumner had possession of Mokapu and was residing thereon. His statements above quoted clearly *cannot rebut his earlier solemn statements* (which we here invoke and rely upon) in his sworn answer in the equity case (Equity No. 1828) that he had possession of Mokapu continuously *for himself*:

“That, pursuant to said trust deed, with the permission of the grantee therein named, *this respondent* \* \* \* *went into possession of said prem-*

ises to reside thereon and use the same for grazing and agricultural purposes, *and ever since has been in possession thereof* and residing thereon, and using the same for grazing and agricultural purposes.”

Transcript p. 306.

(See said Equity Answer and reference thereto in 22 Hawaiian at page 57.)

The witness Gear states that Sumner was not in possession of Mokapu for almost a year before the lease of June 1, 1910, was executed nor almost a year thereafter, nor up to the time this defendant in error was given possession of said land.

“Mr. Sumner never went to Mokapu during my connection with the place from the latter part of October 1909, until I left in April 1911; was never at Mokapu any of that period.”

Direct examination of Gear, Transcript p. 187.

It appears, moreover, that the said Gear surrendered his possession to Fred Harrison. This was in the year 1911, and, upon the theory that a state of facts or situation once shown to exist is presumed to continue until the contrary is shown (see *1 Greenleaf Ev. Sec. 41; 1 Wig. Ev. Sec. 437; Carey v. Lumber Mills*, 21 Haw. 506, 511), we may safely assume for the purpose of this case (in the absence of all evidence that Harrison was ever interrupted in his possession assumed in 1911) that he has remained in peaceable possession of Mokapu under the lease in question until the present time.

“Q. What time did you say you left Mokapu?

A. I think it was about the middle of 1911; it may have been earlier than that.

Q. Do you know of your own knowledge who took possession after you left?

A. I do.

Q. Who?

A. Mr. Fred Harrison."

Direct examination of Gear, Transcript p. 193. :

The court in passing on this evidence, could only find that it was absolutely immaterial and irrelevant as to the question whether or not the trustee in June, 1910, had power to execute the lease in litigation. There is nothing in this evidence tending to show a lack of power by the trustee or any flaw in defendant in error's title to this leasehold interest. The trial court below saw in all this evidence only evidence of a claim of right or title in one Sumner, a stranger, and refers to this testimony as "certain oral evidence as to the transfer of defendant's interest under said documents and on the nature of the alleged residence on and possession of the land by Sumner pursuant to said transfers."

On this theory the evidence was properly rejected.

Any evidence tending to show a claim of right or title in a stranger is irrelevant in a statutory suit to quiet title.

(*See Rev. L. of Hawaii* (1915), Sec. 2750;  
*Kahoiwai v. Limaue*, 10 Haw. 507 at p. 510;  
*Eaton v. Giles*, 5 Kans. 24;  
*Brenner v. Bigelow*, 8 Kans. 496;  
*Steele v. Fish*, 2 Minn. 153;  
*Wilder v. City of St. Paul*, 12 Minn. 192;  
*McKinzie v. Merrill*, 15 Ohio St. 162;  
*Dawson v. Town of Orange*, 78 Conn. 96.)

All the defendant is allowed to show is (as the trial court well said) a title in himself *as good or better* than plaintiff's.

The evidence above cited does not in any way tend to show that defendant in error or his predecessor took no title to the lease of June 1, 1910. The alleged assignee was not exercising his election to reside on the land for a long period before the lease was executed nor has he shown an exclusive residence since. Therefore, even if the two conveyances of January, 1906, were absolute and not mere security assignments, and if Sumner succeeded to all of plaintiff in error's beneficial rights, the trustee, nevertheless, from all that appears (and we must presume his action regular till the contrary be shown) had the right and power to create the lease of June 1, 1910, and the same was validly created. The evidence in question, having no bearing on the issue, was properly rejected.

The attempt of the plaintiff in error to show that his residence on Mokapu was as agent for Sumner of course must fail. The right of residence conferred by the trust deed was a right, we submit, that could not be satisfied except by a physical residence on the part of the beneficiary. But plaintiff in error so clearly shows that the claim of a residence by agency is not honestly advanced that we need not dwell on the point.

Further, the principle of law is clearly settled that even if the *cestui* did have a right to repudiate the act of the trustee he must take some active and timely step to repudiate it or he will be taken to have affirmed it and renounced his right to repudiate.



We cite merely one typical case, where it is held that the *cestui* may not sit by and speculate at the expense of the third party, thinking to later repudiate the transaction if he considers it advantageous. Justice Caton in the opinion cited says:

“This speculative disposition is as repulsive to a court of equity in a *cestui que trust*, toward his trustee, as in a purchaser toward his vendor. The one is as much bound to deal fairly as the other. The law must prohibit the one as much as the other from speculating upon chances of future events. Granting to complainants the right to repudiate this purchase, and throw it upon the hands of the defendant for any cause, he has a right to know whether they would avail themselves of that right, so soon as they discovered the facts which conferred upon them that right, and had investigated, or had a reasonable time to investigate, the facts by which their election to affirm or disaffirm his acts was controlled.”

*Follansbe v. Kilbreth*, 17 Ill. 522.

Thus we say that in our case, residence or no residence, by *cestui* or assignee, by failing to in any way repudiate the action of the trustee in making the lease, and by allowing Gear and the defendant in error to hold for some four years without molestation (as is established by the evidence of Gear as to his own possession and the entry of Harrison and the failure by the defense to show any interruption of plaintiff's possession—which, by the presumption of continuance, will be held to have been continuously peaceable to date) both *cestui* and assignee waived any right which they may have had of further residence, and waived any right to later repudiate the action of the trustee.

It must be clear that, under the evidence, the assignee Sumner not being in open possession when the Gear lease was executed but, on the contrary, the plaintiff in error being in a possession so clearly consistent with the original trust, and neither defendant nor his assignee Sumner being shown to have interrupted Gear or the defendant in error in their possession, the defendant in error must be held to have a clear title to his one-half interest in said leasehold estate.

(C)

**Aside from all else, the right to reside on Mokapu was so purely personal to plaintiff in error that it could not pass by assignment to Sumner.**

We feel sure of the soundness of this point, and will urge it, but as briefly as possible, since it seems to have no application to the facts, it being clear, as already shown, that the assignments in question (1) were not intended to pass more than a security title and (2) even if they passed all of the beneficiary's rights, the assignee had not exercised his election to reside on Mokapu in any manner which could affect the trustee's power to create the 25-year term.

But we confidently submit that the only right the plaintiff in error could assign is the right to the rents and profits realized from Mokapu; that he could not transmit to an assignee the purely personal privilege of residence limited by said trust deed.

In this connection we desire to call the court's attention to that class of cases which hold that, where there

is anything in the instrument creating the trust which either expressly or impliedly can be said to restrict or forbid any alienation by the beneficiary of his interest, then, in so far, the beneficiary's interest is not alienable. A review of the cases will show that the beneficiary's interest may be alienable either because its alienation would be incompatible with the terms and evident intent of the trust instrument, or because it is of such a personal nature as to be inalienable almost as a matter of course.

See 39 *Cyc.* 236, where a number of cases are cited to support the contention that where the beneficiary's right of alienation "is expressly or impliedly restricted or forbidden by the instrument creating the trust" there is no power of alienation.

We submit that in the case at bar the creator of the Sumner trust has, by implication at least, restricted not only the power of alienation on the part of the beneficiary, but also the trustee's power to such an extent that it is fully beyond the power of the trustee to permit any person other than the beneficiary himself to reside upon the premises, unless through such residence he procures an income, which, under the terms of the trust, must be paid to the beneficiary.

See especially,

*First National Bank of Nashville v. Nashville Trust Company* (Tenn.), 62 S. W. 392, 399.

Although in this case, upon the happening of a certain contingency which did in fact happen, the trustee was also authorized to resume possession of the prem-

ises, a consideration of the decision will show that the court was of the opinion that the right to reside was itself non-assignable because of its thoroughly personal nature. And indeed, it is surely true that occupation by one man is a very different thing from occupation by another, and a trust permitting the one, and the one only, should be held impliedly to prohibit the other.

See

*Alexander v. Owens*, 4 Ken. L. Rep. 621, as cited in 39 Cyc. at page 239.

In connection with this general topic see *Partridge v. Cavender*, 9 S. W. 785, where the court held that the creator of the trust by his language showed an intent to make the income or benefit to be derived from the trust property enjoyable only by the named beneficiary and the law would give effect to that intent and make such beneficiary's interest non-assignable.

See also the following:

“By the will of the father, the farm in question, together with the stock and farming utensils thereon, were devised to trustees during the life of the son, upon the trust, that they would *permit him to occupy it* during his life, or would let it and *pay over* to him, *the profits* during his life, with remainder over to the wife and children of the son.  
\* \* \* It was held, that the son acquired no legal title to the property, either by the contract or the will, but that it remained in the father during his lifetime, and upon the probate of the will, vested in the executors, by relation, from the time of the decease of the father, upon the trusts set forth in the will.”

Headnote from *John De Wolf, et al. v. Henry C. Brown*, (15 Pick., Mass. 462).



And note the following leading decisions:

*Perkins v. Hays*, 3 Gray 405, 409;  
*Seymour v. McAvoy*, 121 Calif. 438, 442;  
*Mattison v. Mattison*, 53 Ore. 254, 259;  
*Monday v. Vance*, 51 S. W. (Tex.) 346, 349;  
*Roberts v. Stevens*, 84 Me. 325;  
*Bennett v. Bennett*, 217 Ill. 434, 442;  
*Baker v. Brown*, 146 Mass. 369, 371;  
*Moore v. Simmons*, 2 Head (Tenn.) 545;  
*Pickrel v. Zell*, 2 McArthur (D. C.) 65;  
*Markham v. Guerrant*, 4 Leigh (Va.) 279;  
*Brown v. Postell*, 4 Rich. Eq. (S. C.) 471.

And see especially *Barnes v. Dow*, 59 Vt. 530; and on the general proposition heretofore referred to, see *Perry on Trusts*, Second Edition, Volume 1, Section 396-a. These cases and authorities are entirely controlling and render any separate answer to plaintiff in error's general authorities entirely unnecessary. The law cited by the plaintiff in error on *profits a prendre*, easements, licenses, equitable *interests* as distinguished from equitable *titles*, and the like, is sound law in the connection in which the same was decided or declared; but the entire discussion is inapplicable to the case at bar, as the authorities last cited conclusively show.

The Supreme Court of Hawaii in its decision in 22 Hawaiian at page 57, holds that one purpose of the trust deed was to protect the estate even as against the beneficiary, whose right to possession of the premises was *expressly limited*, and in that court's later decision, in 22 Hawaiian at page 468, it is said:

“We hold that under the deed of trust here involved the right of Davis to occupy and use the land for certain purposes was personal to Davis and did not extend to his assigns. This was the intention of the donor as we gather it from the deed. The object was to provide and secure for the defendant either a home and an opportunity to make a living out of the land, or an income, as he might elect to take. A right to assign the right of occupancy would be incompatible with that object and we must give effect to the apparent intention of the donor in this respect even though the right to assign the income was not restricted. The defendant having waived his right to occupy the premises, the lease to Gear was valid and operative, and its validity was not affected by the conveyances made by the defendant to Sumner.”

*Harrison v. Davis*, 22 Haw. at 468.

This decision is, we submit, eminently sound and must be affirmed.

(D).

**As to estoppel.**

We further urge that the plaintiff in error, by reason of having signed the Gear lease of June 1, 1910, by way of consent thereto, is estopped from showing that long prior to that time he had assigned away to Sumner all his interest in Mokapu.

Assuming that it were possible for plaintiff in error to have vested in Sumner all the rights under the trust deed that defendant had, we submit that the trial court's ruling excluding all evidence of such transfer would have been justified by the theory of estoppel alone.

The original Gear lease (see Exhibit "A" attached to original bill of complaint, Transcript p. 28) was from Holt, trustee under the Sumner trust deed, to Gear. As a matter of record, therefore, the lessee was put on notice that he was acquiring a lease from the trustee under the Sumner trust deed in which instrument R. W. Davis was the beneficiary. This being true, and the said R. W. Davis signing said lease by way of consent thereto (see 22 Hawaiian, top of page 53) the execution by the plaintiff in error Davis of this form of "consent" is surely tantamount to an assurance that the Davis who signed was the Davis who was the beneficiary under said trust deed.

We submit that this was a representation made to Gear, defendant in error's predecessor in title, upon which representation Gear relied, and this is not affected by the proposition of law to the effect that a public record is an available means of information and one not taking advantage of the same cannot claim an estoppel; because Gear would of course know that Holt, as successor to Bruce Cartwright, the original trustee, had the legal title to Mokapu, and had the full and sole right to effectuate leases thereof, and it is difficult to perceive any reason why Gear should be put on his notice as to any conveyance by *Davis* when Davis, as the evidence shows, was in active occupation of Mokapu at the time the lease was given.

The natural thing for Gear to have done would be to search the record office for any record of a conveyance *by the trustee* or an extinguishment of the trust; but

in case this trust had not been extinguished and the trustee Holt was still the legal owner, as trustee, of Mokapu, under the Sumner trust deed, the only case in which an assignment of the plaintiff in error's interest would complicate the situation would be where the assignment by him to some stranger was followed (even supposing that this assignment carried with it the right to reside) by the actual physical residence on Mokapu of such assignee; and, as we have said, the defendant Davis was in open possession of Mokapu at this time.

This throws added light on the claim heretofore put forward by the plaintiff in error that his residence on Mokapu, after the year 1907, was as "agent for Sumner". We take it, that under the circumstances of this case, the fact that the plaintiff in error signed the lease of June 1, 1910, by way of affirmative consent and apparently as the present beneficiary, coupled with the fact that the beneficiary named under such trust deed was in open possession of the land of Mokapu at this time (and there being no conveyance of record divesting the trustee of his title nor any proceedings of record extinguishing or terminating said trust) would clearly estop this plaintiff in error from showing, in a suit between himself and the lessee from the trustee, that, prior to the time when he signed this consent to said lease he had conveyed away his right and title to a stranger.

All this is, of course, quite aside from the proposition that such conveyance would be entirely immaterial unless it were coupled with proof that the assignee from



the beneficiary had taken possession of Mokapu before the lease was executed or soon thereafter had repudiated the actions of the trustee.

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#### POINT IV.

**OBJECTIONS (a) THAT A PAID UP LEASE HAS BEEN DECREED TO DEFENDANT IN ERROR; AND (b) THAT THE COURT FAILED AFFIRMATIVELY TO DECREE PLAINTIFF IN ERROR'S INTEREST IN THE PROPERTY CLAIMED.**

(a) Was a paid-up lease decreed?

It is submitted that a "paid-up lease" was not granted to defendant in error.

The judgment of the Hawaii Supreme Court simply decrees "that the judgment of the Circuit Court \* \* \* be and the same is hereby affirmed" (Transcript p. 344); and the Circuit Court judgment decrees that the plaintiff, defendant in error herein, "is the owner and entitled to the immediate possession of an undivided one-half for a term of years, to-wit, until June 1, 1935" in the land of Mokapu "described in that certain lease from John D. Holt, trustee, to A. V. Gear, dated June 1, 1910, and recorded in the office of the Registrar of Conveyances, in said Honolulu, in book 343, at pages 347-351" (Transcript pp. 80, 81).

The above judgment, in its opening paragraph, refers to its finding as being one for the term of years "described in plaintiff's bill of complaint" (Transcript p. 80), and said bill of complaint alleges plaintiff's (defendant in error's) ownership of said leasehold interest,

describing the said lease as recorded "in book 343, pages 347-351" (Transcript p. 27), and incorporating the same as an exhibit attached to said complaint as "Exhibit A" thereof (see Transcript, p. 28).

The said exhibit, thus incorporated, sets out fully *all the terms and conditions upon which said lease is granted*, including the provisions as to rents, and it is thus apparent that the judgment of the Hawaii Supreme Court in terms has decreed to defendant in error merely *the title to an undivided one-half interest in the lease for years in question, upon the express terms and conditions governing said lease*, as set out therein.

It cannot, of course, be contended that defendant in error is relieved from any further payment of rents under said lease; but he owns an undivided interest in the term thereby demised, subject to defeasance or forfeiture in the event of non-payment of the rents. And it is this ownership which is decreed to him by the said judgment.

The decision in *German-American Savings Bank v. Gollmer*, 155 Calif. 684, cited by plaintiff in error in this connection, is not in point. In that case the trial court decreed that the plaintiff was the owner of the leasehold described in the complaint "subject only to the payment of rent and taxes" (155 Calif. 686), when, as a matter of fact, the lease in question contained many other distinct provisions which were express conditions in the lease. Such a decree is clearly erroneous. But in the case at bar defendant in error's *title* is adjudged to the interest in the lease of June 1, 1910, which is

a thoroughly sound judgment, the court not purporting in any way to relieve defendant in error from the conditions of the lease which, of course, remain operative exactly as provided by the terms of the lease itself.

**(b) Should the court have decreed any interest to the plaintiff in error?**

The error into which plaintiff in error here falls is in failing to appreciate that the "interest in real property" sought by this defendant in error to be quieted, is *that undivided one-half interest in the term of years claimed and owned by defendant in error*—not the remaining one-half interest admittedly owned by plaintiff in error. The trial court and the Hawaiian Supreme Court have adjudged that this *entire* undivided one-half interest is vested in defendant in error, and this *is* an adjudication that plaintiff in error has *no title* therein. Therefore there is nothing to decree to plaintiff in error.

The undivided one-half interest claimed by defendant in error is the interest coming to him through the assignment by Gear, the original assignee, to C. A. Peterson, from Peterson to Addie B. Gear and from Addie B. Gear to defendant in error (see 22 Hawaiian at p. 53) and not the remaining one-half interest which defendant in error has admitted was vested in the plaintiff in error, and which the Hawaiian Supreme Court referred to as having been executed on June 16, 1910, by Gear to plaintiff in error, "the instrument of assignment not appearing, however, to have been signed by defendant" (see 22 Hawaiian p. 53, lines 8-12).

It was this latter assignment which counsel for defendant in error had in mind in making the unfortunate "admission" on page 179 of the transcript herein that "Robert Wyllie Davis took a half of our term of years". And the meaning of that "admission" is made clear by the remarks of the trial court on the same page of the transcript where the court says:

"If the evidence is offered solely for the purpose of showing an admission \* \* \* *that Robert Wyllie Davis was the owner of a one-half undivided interest for a term* \* \* \* it is \* \* \* cumulative."

The Supreme Court of Hawaii adopted the obvious meaning of the "admission" invoked by plaintiff in error, in holding that:

"The statement, if correctly reported, was not happily phrased, but what counsel meant evidently was that *the defendant owned a half interest in the term demised to Gear*. That must have been the understanding of the trial court, and, we are satisfied, that was the proper view."

*Harrison v. Davis*, 22 Hawaiian at p. 467.

And we submit the same to this court as the only fair view on the point involved.

There is, moreover, nothing in Sec. 2750, Rev. L. of Hawaii, (1915), that requires the court to decree a defendant's interest, when the facts disclose that such defendant has no interest. Unlike the case of *Pennie v. Hildreth*, 22 Pac. 398, cited by plaintiff in error, there is no claim in the case at bar that the defendant in error owns or claims any interest *in the property in controversy*—because the "property in controversy" in the



case at bar is *the undivided one-half interest* coming to defendant in error from Gear through the mesne assignees Peterson and Addie Gear. That *particular one-half interest* has been adjudged to be vested in defendant in error to the exclusion of the plaintiff in error; and although the latter may own the *remainder of the title*, it is only the first undivided interest that is in controversy, and, that having been decreed to be in defendant in error, the substance of the decree is a finding that plaintiff in error, has *no* right, title or interest in the “property in controversy”.

We submit that the form of judgment is unassailable and plaintiff in error is not entitled to an affirmative decree as to any interest in Mokapu (separate and distinct from the interest sought to be quieted), which he may own or claim.

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#### RESUMÉ:

Our own contentions (supporting the action of the court in ruling against the theory of a “dry trust” and in excluding the deed of January 1, 1906, and mortgage of January 2, 1906, and the oral evidence of possession thereunder) are substantially the following:

#### FIRST.

The trust here involved being an active trust, the Statute of Uses does not operate to execute the same.

#### SECOND.

The said deed and mortgage and said oral evidence, if offered as evidence of outstanding title *in one not a*

*party to this suit*, are inadmissible in evidence because immaterial under Rev. L. of Haw. (1915), Sec. 2750, *Kahoiwai v. Limaau*, 10 Haw. 507, and the other authorities cited under our subheading “b”, *supra*.

### THIRD.

If said evidence was offered as evidence tending to show that by reason of the said conveyances and later occupation of Mokapu the subsequent lease of June 1, 1910, was invalidly created, the same does not support or tend to support that contention, because:

- (1) The conveyances in question were mere security assignments not intended to pass plaintiff in error's absolute rights, and plaintiff in error remained the active beneficiary notwithstanding said assignments.
- (2) If said conveyances be held absolute and not security assignments, the result is the same, because:
  - (a) It was possible to assign the rights to the rents and profits only—not the right to reside; the trustee would still retain legal title and control and have power to effectuate leases; and the only effect of the assignments would be to vest in Sumner the right to the rentals realized from any lease executed by the trustee.

- (b) If *all* rights under the trust deed be held assignable and if said conveyances operated to substitute Sumner as active beneficiary, the result is the same; because Sumner did not elect to reside on Mokapu for at least a year prior to the execution of the lease of June 1, 1910; nor has said lease ever been repudiated since its execution, defendant in error having succeeded to Gear's peaceable possession in 1911 and (presumably) continued in peaceable possession to the present time.

#### FOURTH.

Under whichever theory said evidence is offered, it is rightfully excluded by reason of the estoppel of the defendant to take advantage of the same, he having signed the lease as beneficiary, and being *himself* (and not Sumner), at the time, in open possession of Mokapu.

The points made by the plaintiff in error in the brief heretofore filed are, we submit, not well taken.

We submit that, upon reviewing this entire record and passing upon the specifications of error urged by the brief of the plaintiff in error, this court must hold that there is no error apparent in the record and the

judgment of the Hawaiian Supreme Court must be affirmed.

Dated, San Francisco,  
April 24, 1916.

Respectfully submitted,

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